


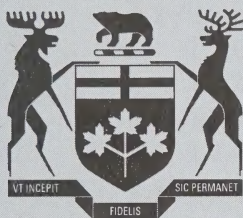
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REPORT OF THE IPPERWASH INQUIRY



Ontario

VOLUME 2 Policy Analysis

The Honourable Sidney B. Linden, Commissioner

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INTRODUCTION

Public inquiries are often called in response to tragedies involving loss of life or serious harm to an individual or a community. In these circumstances, the public inquiry is often given a dual mandate. Its first mandate is to independently investigate the event in order to determine what happened and why. Its second mandate is to analyze the broader circumstances that may have contributed to the tragedy and recommend measures that may help prevent similar occurrences in the future.

The Ipperwash Inquiry had such a dual mandate. Dudley George was shot and killed by an Ontario Provincial Police officer at Ipperwash Provincial Park on September 6, 1995. The Order-in-Council establishing the Inquiry gave me the responsibility to:

1. Inquire into and report on events surrounding the death of Dudley George; and
2. Make recommendations directed to the avoidance of violence in similar circumstances.¹

Volume 1 of this report (*Investigation and Findings*) deals with my findings regarding the events surrounding the death of Dudley George. This volume contains my “recommendations directed to the avoidance of violence in similar circumstances.”

Dudley George was the first Aboriginal person to be killed in a land rights dispute in Canada since the nineteenth century. Mr. George’s death was an important reason to consider the broader issues of Aboriginal occupations and protests in detail. The circumstances of his death raise several important public policy issues which are properly the subject of public scrutiny, including the resolution of treaty and Aboriginal rights claims, the policing of Aboriginal occupations and protests and the relationship between Aboriginal peoples and the police, and the relationship between government and the police.

Until recently, some people may have believed that the events at Ipperwash were unique and unlikely to be repeated. Unfortunately, Caledonia and other recent events have demonstrated that Aboriginal occupations and protests continue to be features of the political and policing landscape in Ontario. Ipperwash and Caledonia are not isolated incidents. Aboriginal occupations and protests occur frequently.

People may also have assumed that the central controversies raised by Ipperwash were largely the allegations of political interference in policing and of police racism. There has been considerable focus on these issues in the media and in public debate, which has tended to overshadow the very significant issues around land claims and other Aboriginal issues that are at the heart of the Ipperwash story and that of so many other Aboriginal occupations and protests across Ontario and Canada. This is not to say that police/government relations or police racism are not important issues. They clearly are, and I consider both in this report. However, other issues are equally important to my Part 2 mandate.

Ipperwash is, of course, only one in a series of well-known Aboriginal occupations and protests in recent Canadian history, which includes Oka, Burnt Church, Gustafsen Lake, and Caledonia. For many non-Aboriginal Ontarians, these incidents probably evoke images of confrontation, lawlessness, and violence. Or they may suggest a seemingly intractable conflict between Aboriginal and non-Aboriginal worldviews or between “ancient history” and the practical demands of contemporary society. Most Aboriginal peoples, on the other hand, probably see these incidents as an inevitable and perhaps legitimate reaction to decades, if not centuries, of broken promises, dispossession, and frustration.

This Inquiry is the first systemic analysis of this Canadian phenomenon. Accordingly, this report considered both the roots of Aboriginal occupations and protests and the appropriate policing response to them. My recommendations are listed in Appendix A.

My analysis has convinced me that Aboriginal occupations and protests are not inevitable, nor are they inevitably violent. If I could sum up this report in a single thought, it would be this: The provincial government and other institutions must redouble their efforts to build successful, peaceful relations with Aboriginal peoples in Ontario so that we can all live together peacefully and productively. There have been significant, constructive changes in the law and to key public institutions in the twelve years since Ipperwash. Yet more is needed. We must move beyond conflict resolution by crisis management. And we cannot be passive; inaction will only increase the considerable tensions that already exist between Aboriginal and non-Aboriginal citizens in this province. Research in the course of the Inquiry showed that the flashpoints for Aboriginal protests and occupations are very likely as intense today as they were during Ipperwash, Oka, Burnt Church, or Gustafsen Lake. No one can predict where protests and occupations will occur, but I am convinced that the fundamental conditions and catalysts sparking such protests continue to exist in Ontario, more than a decade after Ipperwash. Indeed, it appears that the flashpoints for Aboriginal protests and occupations may be intensifying.

Throughout this process, I strived to identify reasonable and achievable recommendations for measures to improve the lives of Aboriginal and non-Aboriginal peoples in Ontario and to improve the governance and administration of some of our most important public institutions. The result, I hope, is a plan of action that fair-minded Ontarians can understand and support.

In the balance of this introductory chapter, I briefly discuss the mandate, process, and structure of Part 2 of the Inquiry. A more detailed description of the Inquiry process, including the Part 2 process, is found in Volume 3 of this report (*Inquiry Process*).

1.1 Issues Considered in Part 2

My Part 2 mandate was to “make recommendations directed to the avoidance of violence in similar circumstances.”

My staff and I consulted widely to help us determine which issues should be included in this potentially very broad mandate. I subsequently concluded that the Inquiry had to take into account both systemic and operational policy issues related to “the avoidance of violence in similar circumstances.” Broadly speaking, systemic issues are factors that may have led Aboriginal people to mount protests or occupations in the first place; operational issues come into play once the occupation has begun. As a result, I decided that the Inquiry should focus on three issues in Part 2: respect for treaty and Aboriginal rights, the policing of Aboriginal occupations and protests and the relationship between Aboriginal peoples and the police, and the relationship between government and the police.

1.1.1 Respect for Treaty and Aboriginal Rights

Frustration with existing land, treaty, and Aboriginal rights processes occasionally lead Aboriginal people to blockade or occupy public and private places in locations across Ontario and Canada. Several of the research papers commissioned by the Inquiry contain extensive inventories and case studies of Aboriginal occupations and protests precipitated by a dispute over treaty or Aboriginal rights.²

It is clear to me that the absence of timely, fair, and effective procedures that can be reasonably relied upon to address disputes will likely lead to more occupations and protests in the future. Incidents in the Caledonia and Big Trout Lake regions are but two recent examples pointing to a consistent trend. The risk of violence is present every time police and Aboriginal peoples confront each other in this manner, but confrontations and occupations also contribute to a continuing atmosphere of insecurity and uncertainty with respect to the lands or resources at issue.

I believe, therefore, that it is vital to consider reforms to reduce the number or risk of Ipperwash-like protests in the future, to reduce uncertainty, and to improve relations between Aboriginal and non-Aboriginal peoples for the benefit of all Ontarians.

Because this is a provincial inquiry, the Inquiry necessarily focused on the role and responsibilities of the provincial government. Nevertheless, where I believe it to be appropriate, I comment on the role and responsibilities of the federal government in this report. The federal government chose not to participate in this Inquiry despite several requests that they do so.

1.1.2 The Policing of Aboriginal Occupations and Protests and the Relationship between Aboriginal Peoples and the Police

The mandate of the Inquiry to make recommendations to avoid violence in similar circumstances obviously raises questions about police objectives, strategy, and practices related to policing protests, particularly Aboriginal occupations and protests. I have been very mindful of post-1995 developments in these areas. There have been considerable changes in policies with respect to the policing of Aboriginal occupations and protests and the relationship between Aboriginal peoples and the police in the last twelve years, and I describe and comment on those changes in this report.

1.1.3 The Relationship between Police and Government

The third major issue I consider is police/government relations. The Ipperwash Inquiry is the fifth major Canadian public inquiry in the last twenty-five years to consider this issue in detail.³ I consider this issue both in general and in the context of the specific dimensions of policing Aboriginal occupations and protests.

Most of this report is devoted to these three issues, but I also address a number of important issues that are necessarily related to them.

1.2 Process

I adopted four principles to govern the process and deliberations in the Inquiry: thoroughness, expedition, openness, and fairness.

Very early in the Inquiry process, I decided that Part 2 needed a policy-development process, not a legal process, to meet its substantive objectives. Evidentiary hearings like those in Part 1, and their attendant formal legal procedures, could not provide the coordinated, multidisciplinary, participatory, and systemic analysis of the issues which this part of Inquiry required. Thus, the

Inquiry used a wide range of public policy tools in Part 2 (including research papers, consultation forums, and other resources, as discussed below) rather than formal, evidentiary hearings.

Part 2 of the Inquiry proceeded at the same time as Part 1 did. Conducting the Inquiry in this manner had many advantages. Most significantly, it promoted better integration and sharing of information between the two parts of the Inquiry. Conferences, meetings, or other Part 2 events were scheduled on non-hearing days so that I and other Inquiry participants could attend them.

1.2.1 Part 2 Research, Consultations, and Forums

In large part, Part 2 of the Inquiry was based on an ambitious and innovative research and consultation plan, designed to generate sophisticated yet accessible research on the relevant issues and to promote debate.

The foundation for the research and consultation plan was the more than twenty high-quality research papers commissioned by the Inquiry from experts across the country. These papers include many significant and original contributions to the body of knowledge in the fields they explored. For example, our research included the first comprehensive analysis in Canada that compared and contrasted Aboriginal land, treaty, and rights disputes across the country and the policing issues related to them. The Inquiry organized public consultations or expert roundtables on most of the papers.

These background papers contributed significantly to my understanding of the issues and I refer to them extensively in this report. They are available on the Inquiry website and on the compact disc released with this report, and I recommend them to anyone interested in learning more about these issues. A list of background papers commissioned by the Inquiry is found in Appendix B.

The Inquiry also organized many original and unique Part 2 events, on our own and in partnership with others, including the following:

- The “Ippeewash Inquiry/Osgoode Hall Law School Symposium on Police/Government Relations” in partnership with Osgoode Hall Law School
- An “Emergency Medical Procedures” roundtable in partnership with the Office of the Chief Coroner of Ontario.
- A two-day “Indigenous Knowledge Forum” to explore the differences between Anglo-Canadian and Aboriginal knowledge and to promote understanding of Aboriginal history and traditions

- A one-day community-based “Youth and Elder Forum” with Aboriginal youth and Elders to seek their views on police/Aboriginal relations and policing practices
- The “Evening with the Commissioner,” a town hall public meeting in Thedford, Ontario with residents of the Forest/Lambton Shores community

A complete list of Part 2 events is found in Appendix C.

The Inquiry also cosponsored special two-day sessions organized by the Ontario Provincial Police (OPP) and the Chiefs of Ontario. The OPP session, entitled “Aboriginal Initiatives: Building Respectful Relationships,” presented important initiatives in policing Aboriginal occupations, First Nations policing, and Aboriginal/OPP relations. The Chiefs of Ontario session, entitled “Special Assembly with the Ipperwash Inquiry,” presented the Chiefs’ perspectives on systemic issues affecting First Nations in Ontario.

Finally, the Inquiry produced summaries, DVDs, or webcasts of almost all Inquiry-hosted consultations and panel discussions. Most of these materials were posted on the Inquiry website.

I strongly believe that the background research papers and the record of our consultations and forums will be an important legacy for teachers, students, policy-makers, and the public at large, for years to come.

1.2.2 Part 2 Standing and Funding

The test for Part 2 standing was set out in sections 58–60 of our Rules of Procedure and Practice.⁴ Rule 58 stated the following:

Persons or groups may be granted standing by the Commissioner for Part II of the Inquiry if the Commissioner is satisfied that:

- a) they are sufficiently affected by Part II of the Inquiry; or
- b) they represent distinct ascertainable interests and perspectives essential to the discharge of his mandate in Part II, and which the Commissioner considers ought to be separately represented before the Inquiry. In order to avoid duplication, groups of similar interests are encouraged to seek joint standing.

The Inquiry received thirty-five applications for standing in Part 2. I heard the standing applications, in Forest, from April 20 to 23, 2004. My Ruling on Standing and Funding, issued on May 7, 2004, granted Part 2 standing to twenty-six parties, including several parties also granted standing in Part 1.⁵

Parties with Part 1 and Part 2 Standing

1. Aazhoodena and George Family Group
2. Aboriginal Legal Services of Toronto
3. Charles Harnick
4. Chief Coroner
5. Chiefs of Ontario
6. Chippewas of Kettle and Stony Point First Nation
7. Estate of Dudley George
8. Marcel Beaubien
9. Michael Harris
10. Municipality of Lambton Shores
11. Ontario Provincial Police
12. Ontario Provincial Police Association
13. Province of Ontario
14. Residents of Aazhoodena
15. Robert Runciman

Parties with Part 2 Standing Only

16. Aboriginal Peoples Council of Toronto
17. African Canadian Legal Clinic
18. Amnesty International
19. Canadian Civil Liberties Association
20. Centre Ipperwash Community Association
21. Chippewas of Nawash Unceded First Nation
22. Law Union
23. Mennonite Central Committee Ontario
24. Nishnawbe-Aski Police Services Board

25. ONFIRE

26. Union of Ontario Indians

Part 2 standing entitled a person or organization to receive the research papers of the Inquiry, participate in Inquiry consultations, and apply for project and participation funding.

In accordance with the Order-in-Council, I made recommendations to the Attorney General on funding for parties with Part 2 standing “to the extent of the party’s interest, where the party would not otherwise be able to participate in the Inquiry without such funding.”⁶

Part 1 funding was essentially for counsel to represent parties in the evidentiary hearing process. For Part 2, two types of funding were available:⁷

- Project funding to undertake research, prepare submissions, organize meetings, and for other relevant projects
- Participation or disbursement funding to help parties participate in Part 2 consultations and panel discussions

Parties requesting funding were required to submit detailed proposals describing their projects and demonstrating relevance to the Part 2 mandate. I reviewed the proposals and made recommendations to the Attorney General of Ontario. The Attorney General then considered my recommendations and decided whether to grant funding. The Attorney General accepted all of my recommendations.

In general, I believe that the Part 2 parties worked well with me and with Inquiry staff. Their contribution to the Inquiry was significant and considerably assisted my understanding of the issues.

1.2.3 Projects of the Parties

A number of parties with Part 2 standing applied for and received funding for specific projects. The purpose of project funding was to provide resources to parties to assist them in preparing submissions, undertaking research, organizing meetings or consultations, or in carrying out other relevant projects that advanced the objectives of Part 2 and assisted the Inquiry in fulfilling its mandate. Two parties, the OPP and the Government of Ontario, undertook many projects for the Inquiry without applying for specific funding.

The projects undertaken by the parties addressed a broad range of topics and perspectives and they are an important part of the research legacy of the Inquiry. Like the background papers, they contain many significant and original contributions to the body of knowledge in their fields and they contributed significantly

to my understanding of the issues. A list of projects submitted to the Inquiry is found in Appendix D.

The OPP, the Chiefs of Ontario, and the Government of Ontario also prepared extensive and helpful materials in response to specific requests by the Inquiry.

Like the commissioned research papers, the written reports submitted to the Inquiry by parties are available on the Inquiry website and on the compact disc released with this report, and I recommend them to anyone who is interested in learning more about these issues.

1.2.4 Public Participation

I considered it important to give parties with Part 2 standing and interested members of the public a meaningful and ongoing opportunity to participate in Part 2 events or proceedings. I tried to ensure that the parties and public had every reasonable opportunity to participate in our process, or at least be aware of what we were doing.

The starting point for our public participation strategy was the Inquiry website. All of our background papers, party projects, and submissions were posted on the website. We also posted summaries, DVDs or webcasts of almost all Inquiry-hosted consultations and panel discussions.

In addition to parties with Part 2 standing, we invited interested individuals or stakeholder organizations to many of our Part 2 meetings. We issued press releases for most events, and also advertised some meetings in the media.

Several organizations outside the Inquiry process also provided very valuable research or support to the Inquiry, including the Royal Canadian Mounted Police.

Finally, Part 2 staff attended or spoke at several public meetings or conferences over the course of the Inquiry to promote understanding of the work of the Inquiry.

1.3 Research Advisory Committee

I appointed a Research Advisory Committee (RAC), composed of leading academics and practitioners, to assist me in identifying research topics and to provide ongoing advice and support to the Inquiry. The role of the RAC was to advise and assist the Inquiry, but not to determine the recommendations or the process.

Over the course of the Inquiry, the RAC provided invaluable advice and assistance, both as individuals and as a group. The content of this report has been immeasurably enhanced through their involvement, and I want to thank each of them for their indispensable contributions:

Professor Darlene Johnston

Professor Johnston joined the Faculty of Law at the University of Toronto in 2002 as an Assistant Professor and Aboriginal Student Advisor. Her teaching areas include Aboriginal Law and Property Law and some of her research focuses on the relationship between totemic identity, territoriality, and governance.

Mr. Wally McKay

Mr. McKay is from Sachigo Lake First Nation. He has over thirty years' leadership experience, including terms as Grand Chief of Nishnawbe Aski Nation and Ontario Regional Grand Chief. Mr. McKay is a consultant specializing in First Nations governance and policing issues. He is also a member of the OPP Commissioner's Select Liaison Council on Aboriginal Affairs, among other appointments.

Mr. Philip Murray

Mr. Murray was Commissioner of the RCMP between 1994 and 2000. He retired in September 2000. Mr. Murray holds a Bachelor of Business Administration and a Certificate in Personnel Administration from the University of Regina. He is a graduate of the Canadian Police College Advanced Police Studies Program. He is also a graduate of the National Executive Institute of the United States Federal Bureau of Investigation (FBI). Mr. Murray served with the RCMP for thirty-eight years. He has broad experience in operational policing and management, progressing from a uniformed peace officer to the most senior position of Commissioner of the RCMP.

Professor Kent Roach

Professor Roach is a professor of law and criminology at the University of Toronto. He holds degrees in law from Yale and the University of Toronto, and a degree in political science and history from University of Toronto. He served as research director for the Ontario Law Reform Commission Project on Public Inquiries, and as Dean of Law at the University of Saskatchewan. Frequently, he has appeared before the Supreme Court of Canada as counsel for a number of public interest groups, acting pro bono.

Mr. Jonathan Rudin

Mr. Rudin was the co-author and researcher of the Royal Commission on Aboriginal Peoples report on criminal law, *Bridging the Cultural Divide*.⁸ He is the Program Director at Aboriginal Legal Services of

Toronto, where he assisted with the development of the Community Council Program and the Gladue (Aboriginal Persons) Court at the Toronto Old City Hall courthouse.

Professor Peter Russell, O.C.

Professor Russell taught political science at the University of Toronto from 1958 to 1996, specializing in judicial, constitutional, and Aboriginal politics. He is a past President of the Canadian Political Science Association and an Officer of the Order of Canada. He is the author of *The Judiciary in Canada: The Third Branch of Government*, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* and co-editor of *Judicial Power and Canadian Democracy*. His book on the Mabo case and Indigenous decolonization was published in 2005.⁹

The RAC also included two members who had to withdraw from the committee for personal reasons: Mr. Earl Commanda and Ms. Tonita Murray. Mr. Commanda is from Serpent River First Nation and is a former Grand Chief of the Union of Ontario Indians. Ms. Murray is a former Director General of the Canadian Police College and Director of the Police Futures Group, a policy think-tank on policing associated with the Canadian Association of Chiefs of Police.

1.4 Part 2 Team

Nye Thomas, Director of Policy and Research, led the Part Two team for the Inquiry. Under his thoughtful stewardship, the Inquiry isolated and thoroughly explored the many complex issues of relevance to the policy component of my mandate. Mr. Thomas brought his extensive policy and research background to our work, and I am particularly grateful for his assistance in helping to prepare this volume of my report.

Mr. Thomas's legal credentials, his knowledge of the workings of government, and his significant experience in research, policy development, consultation, and report-writing (notably, the skill and experience he gained in crafting the 1999 blueprint published by Professor John McCamus on the future of legal aid in Ontario) were ideally suited to shaping and executing the policy research agenda for this Inquiry. His skill and energy allowed him to "hit the ground running" to move the Inquiry forward.

Mr. Thomas was supported by policy counsel Noelle Spotton and part-time policy advisor Jeffrey Stutz. Ms. Spotton and Mr. Stutz brought considerable experience, knowledge, and sensitivity to the issues requiring attention and analysis.

1.5 The Research Legacy of the Inquiry

I believe that public inquiries have a responsibility to ensure that their reports and research materials continue to be accessible to the public, organizations, researchers, students, and policy-makers. These materials represent an important research legacy, which is likely to outlive the initial release of the report and the immediate public comment on it. Accordingly, my staff and I will ensure that this report and its background documents are distributed widely. Our website (<http://www.ipperwashinquiry.ca>) will remain active for a period after the release of the report.

1.6 Organization of This Volume

This volume begins with a brief history and analysis of Aboriginal occupations and protests. Thereafter, it is organized thematically into three broad policy areas: treaty and Aboriginal rights, policing and Aboriginal peoples, and police/government relations.

The treaty and Aboriginal rights section includes chapters on settling land claims, natural resources, Aboriginal burial and heritage sites, education about Aboriginal peoples, and institutional arrangements to support the reforms I have recommended.

The policing and Aboriginal peoples chapters examine the policing of Aboriginal protests, First Nations policing, and bias-free policing.

The section on police/government relations analyzes this issue in detail, with particular emphasis on police/government relations during a critical incident involving Aboriginal people.

Each major topic area begins with an introduction and a brief summary of the relevant lessons from Ipperwash.

References to Inquiry Documents in This Volume

Research Papers Commissioned by the Inquiry

A list of all of the research papers commissioned by the Inquiry is found in Appendix B. All of these papers are available on the Inquiry website at <http://www.ipperwashinquiry.ca/policy_part/research/index.html>. They are also available on the Inquiry CD released with this report. These papers are cited as “Inquiry research paper.”

Inquiry Events

A list of Inquiry meetings, symposia, and training events is found in Appendix C. Notes, summaries, and other records of these events are available at the Inquiry website at <http://www.ipperwashinquiry.ca/policy_part/meetings/index.html>. These events are cited as “Inquiry event.”

Projects of the Parties

A list of all of the projects prepared by the parties to the Inquiry is found in Appendix D. All of the reports on these projects are available on the Inquiry website at <http://www.ipperwashinquiry.ca/policy_part/projects/index.html>. They are also available on the Inquiry CD released with this report. These papers are cited as “Inquiry project.”

Submissions by the Parties

The written closing submissions of the parties are available on the Inquiry website at <http://www.ipperwashinquiry.ca/closing_submissions/index.html>. Reply submissions are available at <http://www.ipperwashinquiry.ca/closing_submissions/replies/index.html>.

Testimony at the Hearings

Hearing transcripts are available on the Inquiry website at <<http://www.ipperwashinquiry.ca/transcripts/index.html>>.

Endnotes

- 1 See Appendix 1 (“Order-in-Council”), vol. 3: *Inquiry Process* of this report [Order-in-Council].
- 2 The precise number and frequency of Aboriginal disputes is difficult to determine, but they are quite common. Several of the research papers prepared for the Inquiry include inventories or examples of Aboriginal occupations and protests, including: John Borrows, “Crown and Aboriginal Occupations of Land: A History & Comparison;” Don Clairmont and Jim Potts, “For the Nonce: Policing and Aboriginal Occupations and Protests;” and Jean Teillet, “The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario.”
- 3 The McDonald Commission, the APEC Inquiry, Marshall Commission, and the Arar Commission all discussed police/government relations. I discuss these reports in chapter 12.
- 4 See Appendix 2 (“Rules of Procedure and Practice”), vol. 3: *Inquiry Process* in this report [the Rules].
- 5 By way of contrast, I granted standing to seventeen parties in Part 1. I originally granted standing to twenty-seven parties in Part 2, but one withdrew from the Inquiry.
- 6 Order-in-Council, section 6.
- 7 See Appendix 13(a) (“Commissioner’s Ruling on Standing and Funding, May 24, 2004”), vol. 3: *Inquiry Process* in this report. See also #62 in the Rules.
- 8 Canada. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996).
- 9 Peter H. Russell, *Recognizing Indigenous Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005).

PRIMER ON ABORIGINAL OCCUPATIONS

Aboriginal occupations and protests are often poorly understood or misidentified. The Ipperwash Inquiry is the first systemic study of causes, prevention, and policing related to these events. This section is therefore intended to provide the context necessary for understanding the analysis and recommendations that follow. Subsequent chapters deal with many of the issues raised here in more detail.

Aboriginal occupations and protests can be large or small, short or long, peaceful or violent. They occur in urban areas, rural areas, and in the remote north. Members of the Mohawk, Anishnabek, Cree, and many other First Nations have initiated them. Nevertheless, there are enough similarities among them to identify many systemic features and characteristics. Most importantly, Aboriginal occupations and protests often have systemic roots or catalysts.

The immediate catalyst for most major occupations and protests is a dispute over a land claim, a burial site, resource development, or harvesting, hunting, and fishing rights. The fundamental conflict, however, is usually about land. Contemporary Aboriginal occupations and protests should therefore be seen as part of the centuries-old tension between Aboriginal peoples and non-Aboriginal peoples over the control, use, and ownership of land.

The frequency of occupations and protests in Ontario and Canada is a symptom, if not the result, of our collective and continuing inability to consistently resolve these tensions. This means that Aboriginal occupations and protests are very likely to continue until we design institutions or implement processes that can resolve these issues more effectively. The Chiefs of Ontario told the Inquiry very plainly that “[u]ntil the fundamental issues that give rise to conflict are resolved, future protests are a certainty.”¹

2.1 Why Do Aboriginal Peoples Occupy Land and Blockade Roads?

Why do Aboriginal peoples occupy land and blockade roads? Professor John Borrows answers this question simply and eloquently:

Aboriginal peoples have a pre-occupation. It is *of* land. They occupied land in North America prior to others arrival on its shores. Over the past two-hundred and fifty years Aboriginal peoples have been

largely dispossessed of their lands and resources in Canada. This dispossession has led to another Aboriginal pre-occupation. It is *with* land. It is crucial to their survival as peoples. Its loss haunts their dreams. Its continuing occupation and/or re-occupation inspires their visions.

Aboriginal peoples regard their traditional lands as sacred; it is integral to their culture and identity. They want to continue living on territories that have sustained them for thousands of years. Yet the Crown now claims occupation of traditional Aboriginal lands. When the Crown claims more land, this leads to conflict. Aboriginal peoples desire to hold onto their lands and resources to be more productive and preserve their ancient relationships. They struggle to resist further removal from their territories. They do not want the size of their territories further diminished . . . ²

...

Aboriginal peoples resist other's occupation of lands without their consent because it threatens their political, economic and cultural survival.³

Professor Borrows tells us that Aboriginal peoples often try to maintain their lands though the continued occupation or reoccupation of significant sites. He says that Aboriginal peoples engage in civil disobedience as a response to the perceived or real loss of lands and/or resources. He notes, however, that Aboriginal peoples have sometimes engaged in occupations, reoccupations, and civil disobedience to influence the allocation of resources even if no land, resource, or treaty right was involved. He concludes that "[t]his form of resistance or insistence usually only occurs if other avenues of relief are exhausted."⁴

The core of Professor Borrows's argument and conclusion was reiterated, over and over again, by parties with standing at the Inquiry, Aboriginal organizations, police services, our background researchers, and in many reports pre-dating this Inquiry:

[T]he province of Ontario (and Canada) has been slow to resolve the underlying issues regarding First Nations' access to lands and resources. Unless and until these issues are addressed to the satisfaction of all parties, future conflict is inevitable.⁵

Chiefs of Ontario

In the OPP's view, there is no greater imperative than to ensure that the resolution of Aboriginal treaty and rights claims is timely, fair and well-resourced. Frustration with existing processes has overwhelmingly been shown to be a significant catalyst for occupations, blockades and other protests.⁶

Ontario Provincial Police

[Direct action] signals a new approach by leadership, traditional land practitioners and people in general. The government processes that have manipulated the treaty and aboriginal rights of First Nations have totally exasperated the patience and goodwill of First Nations. The price of doing nothing is too costly to First Nations. The cost to First Nations is to live in continual abject poverty, high mortality rate, declining health status and a hopeless future. The new approach is a wake up call to governments, private sector and public at large that First Nations will not tolerate marginalization while society continues to experience wealth from their resources.⁷

Nishnawbe-Aski Police Services

The fact that there are Aboriginal disputes is, to put it quite simply, indisputable. The fact that such disputes have been a feature of the history of Ontario from its inception is also indisputable. The reason for these Aboriginal rights disputes is simple to identify. Aboriginal peoples resist dispossession from their lands and resources.⁸

Jean Teillet

Aboriginal peoples have not been simply the passive victims of this process. They have used any means at their disposal to halt the relentless shrinkage of their land base. From an Aboriginal perspective, treaties were one means to that end. But Aboriginal people insist that the Crown has failed to uphold those agreements and has generally broken faith with them. And since the nineteenth century, they have continuously protested — to government officials, to parliamentary inquiries, and in the courts — what they see as the resulting inequity in the distribution of lands and resources in this country ... [C]onflict over lands and resources remains the principal source of friction in relations between Aboriginal and other Canadians. If that friction is not resolved, the situation can only get worse.⁹

Royal Commission on Aboriginal Peoples

I discuss the catalysts or flashpoints for land or treaty-based Aboriginal occupations and protests in detail in chapters 3, 4, 5, and 6. In chapters 9, 10, 11, and 12, I consider a range of policing issues and measures to reduce violence once an Aboriginal occupation or protest has begun.

2.2 Aboriginal Occupations and Protests in Context

Land and resources have been allocated between and among Aboriginal and non-Aboriginal peoples in the territory now known as Canada for more than 400 years. Over this period, Aboriginal and non-Aboriginal peoples have used occupations and protests to trigger the transfer of land and resources from one community to another. The historical record shows, however, that non-Aboriginal peoples have used such measures to secure lands and resources to much greater effect than Aboriginal peoples:

Land has passed from Aboriginal peoples to other Canadians through non-Aboriginal blockades and physical occupation. Sometimes treaties preceded non-Aboriginal occupation of land. Treaties attempted to secure the consent of Aboriginal peoples for non-Aboriginal settlement of land and resource use. At other times non-Aboriginal people occupied Aboriginal territories without Aboriginal treaties or consent. In such cases non-Aboriginal peoples might blockade Aboriginal access to important sites and refuse to leave until the government secured non-Aboriginal claims through treaty or some other act. The historic use of occupations and blockades by Aboriginal and non-Aboriginal peoples has significant consequences for the allocation of land and resources today.¹⁰

Professor Borrows also reminds us that efforts by non-Aboriginal peoples to undermine Aboriginal peoples' use of their lands are prevalent throughout Canadian history:

Despite Aboriginal usage and English law recognizing this usage, there have been many attempts to undermine Aboriginal peoples' occupation of their lands. As noted by the Supreme Court of Canada in 1990: "For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored." Unfortunately, for many Aboriginal peoples, this pattern has continued, despite fifteen years of political and legal action. Without recognition, Aboriginal peoples were and are removed from their lands in many ways.

Aboriginal political, economic and cultural power is disrupted to make it easier for non-Aboriginal peoples to strengthen their claims over Aboriginal lands. To assist in their removal, some non-Indigenous peoples have regarded Aboriginal occupation of land as unworthy of recognition or protection. Legal theories often diminish Aboriginal land holdings and deny Aboriginal ownership. Historically the Crown, Courts, Parliaments and Legislatures applied versions of these theories to discount Aboriginal rights to land and resources. These historic presumptions continue to undermine Aboriginal peoples' occupation of their territories in the present day.¹¹

2.2.1 How Many Are There?

Aboriginal occupations and protests are much more common than most non-Aboriginal Ontarians likely realize. Most people in the province have probably heard of Ipperwash, Oka, and Caledonia. A smaller number of people may have heard of Burnt Church or Gustafsen Lake. It is fair to conclude, however, that only Aboriginal peoples are likely to truly appreciate how prevalent Aboriginal occupations and protests are in this province and in Canada.

Despite their frequency and importance, reliable statistics on Aboriginal occupations and protests are hard to find, and it is difficult to determine exactly how many Aboriginal occupations and protests have occurred in Canada. One researcher reports that there were roughly 100 incidents between 1968 and 2000.¹² Another researcher, using a much broader definition, found 616 incidents or actions between 1951 and 2000.¹³ These researchers relied primarily on media reports in the mainstream and Aboriginal media. Both researchers found occupations and protests beginning in the late 1960s, growing steadily in the 1970s, skyrocketing in the mid-1980s to 1990, entering a quieter period in the 1990s, and then increasing again in the late 1990s.¹⁴ The analysis of occupations and protests would benefit considerably if there were a single database or source of reliable historical information about the number, type, and outcome of Aboriginal occupations and protests across the country.

The OPP reported to the Inquiry that it has dealt with more than 100 "Aboriginal critical incidents" since Ipperwash in 1995. Of this total, blockades "represent a significant number of the incidents."¹⁵

2.2.2 Types of Occupations and Protests

Aboriginal occupations and protests can take place in rural, remote, or urban areas. They can be intra-band or directed externally, and focused on specific

issues or general issues. It is also possible to distinguish occupations and protests by the level or type of police response. Intra-band occupations that involve few or no outsiders, have little impact outside the community, and are narrowly focused represent the low end of the scale of police intervention. At the other end of the spectrum are occupations and protests like Burnt Church, Oka, and Caledonia, which involve intensive use of police resources.

2.2.2.1 Intra-Band Occupations and Protests

In their fieldwork, Inquiry researchers Professor Don Clairmont and retired RCMP Inspector Jim Potts found that most occupations and protests were intra-band incidents, engaging the federal Department of Indian and Northern Affairs but few other government agencies. These incidents tended to be concerned with intra-band issues such as reserve elections or the allocation of band resources or benefits. This type of occupation and protest was usually very low key. These researchers also found a second, less common, type of intra-band occupation or protest, undertaken to challenge band policies or agreements on resource development. They concluded that this second type of occupations or protests had greater “disruptive potential” because they were frequently accompanied by claims that individual native rights had been violated. The persons interviewed by Professor Clairmont and Inspector Potts generally agreed that intra-band occupations and protests, regardless of type, were the basic prototype for Aboriginal occupations and protests.

Intra-band occupations and protests are significant for the individuals and communities involved, and they should never be minimized or ignored by governments or the police. Although the impact of intra-band occupations and protests tends to be localized or specific to a particular First Nation or community, very often they are catalysts for, or at least components of, more widespread or far-reaching occupations and protests. Most observers would attribute the occupation at Caledonia, in part, to intra-band disputes.

2.2.2.2 Major Occupations and Protests

The primary focus of this Inquiry was on major or far-reaching occupations or protests. Major occupations and protests are directed toward mainstream governments or institutions. These include the most widely known incidents such as Ipperwash, Caledonia, Burnt Church, Oka, and Gustafsen Lake. They also include less widely known, but still significant, regional protests such as the highway and railway blockades in British Columbia and Manitoba, protests to demonstrate solidarity with other communities, such as the protest by Tyendinaga

Recent Major Aboriginal Occupations and Protests in Canada

(Dates and locations are approximate.)

- Anishinabe Park (northern Ontario, 1974)
- Moresby Island, Queen Charlotte Islands (British Columbia, mid-1980's)
- Algonquins of Barriere Lake (Ontario, 1988-89)
- Lubicon Cree (Alberta, 1988)
- Temagami Anishinabe (northern Ontario, 1988)
- Oka/Kanesatake (Ontario/Quebec, 1990)
- Lillooet, Mount Currie Band (1990-91)
- Peigan Lonefighters Society (Alberta, 1991)
- James Bay Cree (Quebec, 1991-92)
- Chippewas of the Nawash (southern Ontario, 1992-93)
- Revenue Rez (Toronto, 1994-95)
- Gustafsen Lake (British Columbia, 1995)
- Ipperwash (southern Ontario, 1993-)
- Clayoquot Sound (British Columbia, 1985-1993)
- Constance Lake (northern Ontario, 1997)
- Burnt Church (Nova Scotia, 1999-2000)
- Sun Peaks (British Columbia, 2000-)
- South-West Nova Fishing protest (Nova Scotia, 1999-2000)
- Days of Rage Protest (Akwesasne, Ontario, 2001)
- Aroland First Nation blockades (northern Ontario, 2001-2003)
- Red Hill Valley Occupation (Hamilton, Ontario, 2002-2004)
- Grassy Narrows (northern Ontario, 2003-Present)
- Kitchenuhmaykoosib Inninuwug First Nation (northern Ontario, 2006)
- Caledonia (Southern Ontario, 2006-)

warriors in support of the Caledonia protesters, and protests in remote parts of the province or country that raise significant legal, economic, or land issues.

Professor Borrows and others confirm that land and treaties are the central sources for these incidents. There are multiple and complex reasons for each dispute, but most of the examples cited in the Inquiry research papers and submissions point to three major catalysts: land claims, natural resources regulatory regimes, and the actual or potential desecration of Aboriginal burial grounds and other sacred sites.

Some of the major Aboriginal occupations and protests in Canada in the last twenty years or so, as compiled from our research papers, submissions to the

Inquiry, and publicly available media and research, are shown in the table. The list is not exhaustive, but it demonstrates the persistence and geographic range of occupations and protests. Occupations and protests often continue for long periods, and the barricades may rise and fall several times. The larger disputes that trigger an occupation or protest often precede the event by years or decades.

Again, this is by no means an exhaustive list. For example, Professor Clairmont and Inspector Potts report that there have been “numerous” occupations and protests in the lower mainland and upper Fraser Valley of British Columbia, in northern Manitoba, in the Elsipogtog region of New Brunswick, and in south-west Nova Scotia.¹⁶ There have even been occupations and protests on the Gardiner Expressway in Toronto, and a forty-five-day occupation of a Revenue Canada office in Toronto in 1994-95.

As noted earlier, the OPP reports that blockades represent a significant number of the more than 100 Aboriginal critical incidents it has dealt with since 1995. Examples include a protest where a local Aboriginal group entered a provincial park to assert hunting rights, a blockade on a bridge to show support for Aboriginal people in Burnt Church, and a highway and railway track blockade to protest the shipment of garbage to Northern Ontario.

Aboriginal occupations and protests can vary considerably in duration. Some last only a few hours; others last for weeks, months, or even years. The protest at Oka, for example, lasted seventy-eight days. The standoff at Gustafsen Lake lasted for thirty-one days. By the time this report is released, the protest at Caledonia will have lasted for one year. Some occupations and protests have continued, with various levels of intensity, for longer than that.

Major occupations and protests do not necessarily involve the police. The significance and nature of the police response to occupations and protests varies considerably, depending upon the type of protest and the issues involved. For example, the police response to many intra-band occupations and protests is often to simply monitor the situation and quietly keep the peace. The second type of intra-band occupation or protest discussed above typically has a more intensive police response because of its potential to escalate.

The police response can vary widely even to major occupations and protests. Some very significant occupations and protests have had very little police involvement. The protest at Kitchenuhmaykoosib Inninuwug First Nation (Big Trout Lake), for example, could have very significant implications for resource development across Northern Ontario. To date, however, there has not been a very significant police role. The police response itself, therefore, is by no means the only indicator of the significance or impact of an Aboriginal occupation or protest.

2.2.3 *Are Aboriginal Occupations and Protests Violent?*

Images of Aboriginal occupations and protests often include disturbing scenes of real or presumed violence. Scenes of masked warriors standing behind barricades, dressed in military fatigues, with stacks of smoking tires in the background, very often characterize the media coverage of major Aboriginal occupations and protests. Many Canadians will no doubt remember the most enduring image from the Oka crisis in 1990: the face-to-face stand-off between Canadian Armed Forces Private Patrick Cloutier and Mohawk Warrior Brad “Freddy Krueger” Larocque.

Violence against persons and property does occur in the course of some Aboriginal occupations and protests. There have been at least two fatalities: Sûreté du Québec Corporal Marcel Lemay died at Oka and Dudley George died at Ipperwash.¹⁷ There were also hundreds of injuries to protesters, police officers, and military personnel at Oka, and serious injuries to occupiers and police at Ipperwash. Other occupations and protests have also included serious acts of violence to individuals and/or property. At Gustafsen Lake, the police fired thousands of gunshots. There was considerable property damage at Burnt Church, and in the confrontation in and around Owen Sound regarding the fishing rights of the Chippewas of Nawash, to name but a few incidents. The dispute at Caledonia has also seen considerable property damage, including blockades, the destruction of roads and a bridge, vandalism to electrical facilities, and thefts. There have also been a number of physical assaults and serious criminal charges have been laid. It is important to note, however, that both Aboriginal and non-Aboriginal people have been perpetrators and victims of physical injury and property damage. Both Aboriginal and non-Aboriginal people have been killed or hurt or have seen their property vandalized or destroyed in Aboriginal rights disputes.

Notwithstanding these incidents, Professor Clairmont and Inspector Potts report that Aboriginal occupations and protests in Canada over the past fifty years have been notable in their low levels of actual violence.¹⁸ Our analysis of the extensive case studies included in our background papers and in the submissions by parties with Part 2 standing supports this observation.

Thus, while it is important to acknowledge the tragic deaths of Dudley George and Marcel Lemay, and the significant injuries and property damage that have sometimes accompanied Aboriginal occupations and protests, it is also important to point out that, based on the evidence we have seen, violence seldom occurs.

In my view, violence against persons or property is always unacceptable. If the risk of violence is to be reduced effectively, it has to be identified and managed constantly, especially given that the potential for violence is present in every confrontation between police and Aboriginal people. Ipperwash is a sobering

example of an initially peaceful occupation that suddenly turned into a tragedy, to the stunned disbelief of almost everyone.

2.2.4 How Are They Different from Other Protests?

Aboriginal protests and occupations undoubtedly share many of the characteristics and dynamics of other public order events such as labour disputes, political demonstrations, or environment-related sit-ins and blockades. I consistently heard, however, that the law and context applicable to Aboriginal protests is fundamentally different, and they therefore form a unique and discrete category. The following are some of the major differences:

- The issues and the legal context in Aboriginal protests are different from labour or political disputes. The roots of Aboriginal protests lie in treaty and Aboriginal rights, which can date back hundreds of years and are very often protected by the Canadian Constitution.
- There is a history of very difficult relations between police and Aboriginal people, making it difficult to establish trust between police and protesters.
- Unlike most other public order incidents, Aboriginal protests often occur in areas far removed from urban centres.
- A greater number of parties tend to be involved in Aboriginal occupations and protests. In addition to Aboriginal peoples, both the provincial and federal governments may be involved, as well as municipalities, the media, non-Aboriginal third parties, and/or several police forces or other enforcement agencies.
- The potential duration of Aboriginal occupations and protests is longer than that of most public order events. Many Aboriginal protests span days, weeks, or months.
- Aboriginal occupations and protests probably have greater escalation potential than non-Aboriginal occupations and protests because of the solidarity among Aboriginal peoples across the province and country. Protests to show support are common.
- Aboriginal protests and occupations may require intervention by the federal and provincial governments. This is because Aboriginal protests and occupations very often raise public policy and legal issues beyond the scope and authority of police forces and public order policing.

2.2.5 *Are They Effective?*

It is fair to ask whether Aboriginal occupations and protests achieve their objectives, but it is not an easy question to answer. Success or failure is often difficult to determine, even in the case of specific, time-limited incidents. Moreover, an occupation or protest may have both multiple objectives and complex results:

[The] fact that they [occupations and protests] end in peace or violence does not necessarily indicate that they were a failure or a success. There could be larger objectives behind an occupation or blockade indicative of success.¹⁹

There have been several cases where an occupation or protest has resulted in a transfer of land to the protesting First Nation. In 1997, the federal government purchased the land at the centre of the 1990 Oka occupation and blockade and turned it over to the Mohawks for the purpose of expanding their burial ground. While this piece of land was only a small part of the Mohawks' much larger land claim, it had both practical and symbolic importance. In 1992, the Chippewas of Nawash Unceded First Nation occupied an unceded burial ground within the city limits of Owen Sound, on which a housing development had been built, to protest the desecration of their ancestral burial site. In the end, the houses were removed from the burial site, the site was re-consecrated, and the federal government compensated the homeowners.

These examples notwithstanding, most Aboriginal occupations and protests have not resulted in the transfer of lands to the protesting community.²⁰ However, it is too simplistic to evaluate the success or failure of an Aboriginal occupation on the sole basis of whether land was transferred. In many cases, if not most, the protesters were also seeking to *prevent* something from happening to the land, including resource development generally or development that excludes Aboriginal peoples specifically. Or the occupation or protest may have wider or larger political objectives, including raising the profile of an issue or claim or pressuring governments or others to negotiate or recognize a dispute. Nor can we underestimate the importance to individuals and communities of using protest and direct action as a means (or expression) of self-determination. On these grounds, it can be argued that Aboriginal occupations and protests are often successful.

2.2.6 *The Broader Social and Economic Context*

Occupying land requires a commitment of time and energy on the part of protesters and a willingness to sacrifice employment and personal comforts. It requires

an understanding that the occupation could lead to encounters with law enforcement officials that might result in physical injury, or to criminal charges that could lead to jail. If these risks were not known before Ipperwash, they are certainly known now.

Occupations (and other, less-extreme protests) are thus usually the resort of people who feel that they have no other way to make their voices heard and little left to lose. That Aboriginal people in Ontario resort to occupying land indicates not only the depth of their feelings about the issues, but also the depth of their despair.

Aboriginal people are at the bottom of almost all socio-economic indicators in Canada and Ontario. For example, Aboriginal people have shorter life spans and experience higher rates of infant mortality and suicide. Diseases that result from poor living conditions, such as tuberculosis, are much more prevalent among Aboriginal people.²¹

While conditions for off-reserve Aboriginal people tend to be slightly better than for those on-reserve, that is nothing to be proud of. As the Supreme Court of Canada noted in *Lovelace v. Ontario*,

[it] is important to acknowledge that all aboriginal peoples have been affected “by the legacy of stereotyping and prejudice against Aboriginal peoples.” Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing.²²

Aboriginal involvement with the criminal justice system is another indicator of the problems Aboriginal people face, and it also explains why Aboriginal peoples do not view the police as favourably as many other Ontarians do. The statistics show that Aboriginal people are over-represented, both as offenders and as victims of crime.

Across Canada, Aboriginal men now represent one in five inmates in provincial and federal jails. The percentage of Aboriginal women in custody is even higher: one in three women in custody in Canada is Aboriginal.²³ This over-representation continues to grow, even though it has been recognized as a problem for more than fifteen years, and even though governments and judges repeatedly decry it.

Most people think that Aboriginal over-representation in jails is confined to Western Canada. However, as the research paper by Jonathan Rudin reveals, the rates of Aboriginal over-representation in Ontario jails are just as high as they are in Manitoba, and Ontario has the third highest rate among the provinces.²⁴ These statistics apply to youth as well as to adults.

Many people are aware of Aboriginal over-representation in prisons, but fewer know that Aboriginal people are also over-represented as victims of crime. Statistics Canada has reported that Aboriginal people are at greater risk of being victims of sexual assault, assault, and robbery.²⁵ They are also significantly over-represented as victims of homicide. Between 1997 and 2004, Aboriginal people represented 3% of the population, and 17% of homicide victims. The homicide victim rate for non-Aboriginal people was 1.3 per 100,000 of population in Canada between 1997 and 2000. For Aboriginal people it was 8.8 per 100,000, or almost seven times higher.²⁶

2.3 Caledonia

As I write this report, the protest at Douglas Creek Estates, in the town of Caledonia (near Hamilton, Ontario), is one of the longest continuous Aboriginal occupations in Canadian history. One year after the occupation began, Aboriginal protesters remain on the site.

I do not comment extensively on the Caledonia occupation in this report, but I refer to it from time to time as an illustration of systemic historical, legal, or policy issues. In my view, the recommendations and analysis in this report apply to all major Aboriginal protests, but the Caledonia occupation shows the urgency and relevance of the issues before us. It also serves to demonstrate the current practices of police and governments in responding to Aboriginal occupations and protests. Finally, it provides critical lessons about the effects and dynamics of Aboriginal occupations and protests at a local, regional, and provincial level. For all these reasons, it is important to provide some background on the Caledonia occupation to assist readers in understanding it better.²⁷

On February 28, 2006, a group of members of the Six Nations of the Grand River began a protest on a building site bordering Caledonia, Ontario, claiming that the site is on lands which have never been surrendered and which therefore remain part of Six Nations territory. The site is part of a 385,000-hectare plot of land known as the “Haldimand Tract,” which was granted by the Crown to the Six Nations of the Grand River in 1784 for their use as a settlement.

Six Nations has repeatedly presented grievances to the Crown regarding the Haldimand Grant and the Crown handling of Six Nations trust accounts since the early nineteenth century. More recently, Six Nations submitted twenty-eight formal claims to the Department of Indian Affairs and Northern Development between 1982 (when the federal government adopted its “Specific Claims Policy”) and 1995. One of these claims, the “Hamilton-Port Dover Plank Road” claim (now known as the “Highway 6” claim), includes Douglas Creek Estates. This

claim was filed in 1987. It alleged that no lawful surrender exists for lands in the area of Highway 6 and that Six Nations had never been properly compensated for the lands.

By March 1995, none of the twenty-eight claims had been resolved through the federal Specific Claims process and only one of the claims was the subject of ongoing negotiations. The elected council of Six Nations then began litigation on its claims against Canada and Ontario. The Statement of Claim sought an accounting by the Crown for all lands and moneys held in trust by the Crown since 1784 and compensation for any improper dealings with those assets. It identified fourteen cases of alleged misdealing by the Crown as examples of the transactions for which the Crown should provide compensation. One of those cases pertained to how the Crown dealt with the Hamilton-Port Dover Plank Road lands.

At the time of the initial occupation, the owner of the site was Henco Industries. Henco, a land development company, purchased the property in 1992 and was in the process of building a seventy-two-home subdivision on the site—the Douglas Creek Estates. Construction of homes had begun at the time the protesters entered the site.

The protesting group described the action as “reclamation” of the land rather than occupation. The protesters appear to have entered the lands, which are close to the current Six Nations reserve, without prior direction from the elected council of Six Nations or from the traditional Confederacy Chiefs of Six Nations. The Confederacy Chiefs subsequently decided that they supported the continuing protest on the lands.

In addition to occupying Douglas Creek Estates, protesters also erected barricades on the surrounding streets within the community of Caledonia and on the local railway line. In and around Douglas Creek Estates, the protest and the blockades were followed by acts of civil disobedience, vandalism, thefts, and assaults.

In March 2006, Henco obtained an interim civil injunction from a judge of the Ontario Superior Court which required the protesters to vacate the property. Thus began a confusing and unusual series of legal proceedings, including several criminal contempt of court proceedings and orders against protesters who remained on the lands. The Court of Appeal of Ontario would later dismiss most of the lower court orders and comment extensively on the propriety of judicial intervention in police operations and discretion.²⁸

On April 20, more than three weeks after a second contempt order, the OPP went to Douglas Creek Estates and arrested twenty-one protesters. The arrests did not end the occupation. Later that morning, the protesters returned to the site in greater numbers, and the conflict between the protesters and the government

intensified. Many more protesters occupied Douglas Creek Estates. The occupation expanded to include the surrounding roads. A local bridge was burned, fires were set, and another rail line was blocked. Unidentified vandals subsequently set fire to a nearby power transmitter, which caused a blackout in a significant part of Haldimand County.

Part way through the conflict, representatives of the governments of Canada and Ontario and Six Nations began to meet regularly and to work to ease tensions, restore calm, preserve order, and, ultimately, to attempt to resolve the dispute. Soon thereafter, the provincial government agreed to purchase Douglas Creek Estates from Henco.

As of late January 2007, the negotiations appear to be moving slowly, but they are progressing. A level of peace and order has been restored to the community. The blockades on the local highway and on the rail line and elsewhere have been removed. However, there has been no final resolution to the occupation or to the underlying land claims. As noted earlier, Aboriginal protesters remain on the site almost one year after the occupation began.

Presently, the remaining protesters are a comparatively small group and occupy Douglas Creek Estates only. The Ontario government, which now owns the property, has agreed to let the protesters remain and has put the land in trust pending the resolution of the land claims issues. The OPP has laid a total of fifty-three charges, against twenty-eight people, for breaches of the injunction and other breaches of the peace. Both Aboriginal and non-Aboriginal people have been charged.

In addition to purchasing the Douglas Creek Estates, the provincial government has provided Caledonia-area businesses with a financial assistance recovery program to mitigate economic losses suffered as a result of the road blockades.

The Caledonia dispute has been the catalyst for several confrontations between Aboriginal protesters, non-Aboriginal residents of the Caledonia region, and the OPP. Non-Aboriginal residents have held several large public rallies during which there have been violent confrontations with the OPP and Aboriginal protesters. The non-Aboriginal residents have been very critical of the OPP. One website run by opponents of the OPP strategy at Caledonia asks the following questions:

Is it a question that the OPP are completely inept? Is it a question that the OPP are completely clueless? Or is it just that they don't care about the safety of people? Whichever it is, it is time to talk about disbanding the whole OPP force.²⁹

Throughout the occupation, the provincial government has reiterated its

support for the OPP and its desire for a peaceful, negotiated solution. The Premier and provincial ministers have repeatedly urged calm and patience. The Premier, for example, stated the following in the Legislature:

I understand that there is, in some quarters, some impatience and some frustration, but we are dealing with this in a peaceful manner ... We are determined to resolve this, but we will do this in a way that results in no incident and in no compromise to public safety.³⁰

2.4 Occupations and Protests in the Future: What Have We Heard?

In addition to Caledonia, police, provincial officials, and members of the Aboriginal community see a number of other current conflicts or disputes in the province as having the potential to escalate (or re-escalate) into direct action. Rather than listing these disputes specifically, I believe that the Inquiry can assist policy-makers in all sectors by setting out some very general criteria for identifying when an Aboriginal rights dispute may escalate into a wider occupation or protest.

I was told repeatedly that occupations and protests can and do occur anywhere in the province and that the catalysts for them are often unpredictable. The course a protest might take—its duration or intensity, the level of the police response, whether it will become violent, and the government response—can likewise not be predicted with certainty. I have therefore not attempted to set out definitive criteria for determining where and when major protests might occur. Most emphatically, I am not attempting to identify the site of future conflicts like Ipperwash or Caledonia. Rather, what follows are some general observations based on our research and consultations.³¹ They are indicators or conditions which, alone or in combination, appear to make Aboriginal occupations or protests more likely.

Longstanding, Unresolved Treaty Issues

The existence of long-standing, unresolved treaty disputes is perhaps the most important indicator of the potential for an occupation or protest. Frustrations with the inability of governments or existing institutional processes to acknowledge or resolve treaty and Aboriginal rights disputes often leads Aboriginal peoples or communities to initiate occupations and protests.

A History of Previous Occupations or Protests

Aboriginal communities with a history of occupations and protests will often re-establish an occupation or protest if the disputed issue has not been resolved to the satisfaction of the community. Also, a community may have a history of erecting blockades to show support for protesters elsewhere.

Current or Potential Resource or Land Development Controversy

Occupations and protests are more likely where there is some kind of external catalyst or threat to the Aboriginal community or its traditional territory. The threat may take the form of real or potential resource or land development pressure or the real or potential desecration of an Aboriginal burial site.

Poor Relationships between a First Nation and Local Police or Government Officials

Aboriginal occupations and protests appear to be more likely if the First Nation or Aboriginal community has a history of poor relations with local police or with government officials. This is because the trusting relationship or ongoing dialogue often necessary to prevent occupations and protests before they begin may be lacking. Aboriginal people may believe that local officials do not acknowledge their concerns or that they are actively frustrating efforts to resolve them.

Faction within a First Nation

Experience has shown that minority groups or factions within larger First Nations often initiate occupations and protests.

Social and Economic Deprivation

Aboriginal people who are poor or otherwise desperate may feel they have no option but to initiate an occupation or protest to assert their rights.

Important or Prominent Location

In an isolated location, Aboriginal occupations and protests appear less likely to generate the media attention or external support necessary to sustain a protest or to generate consequences beyond the immediate setting of the protest.

Leadership or Community Capacity

Sophisticated, strategy-conscious Aboriginal leaders and communities may initi-

ate occupations and protests as part of a deliberate political plan to advance their rights or interests. This requires a level of community capacity and an ability to organize.

Potential for Converging Issues

Occupations and protests may be more likely if the Aboriginal community or protesters have the potential to converge with environmentalists or others who may support the protest or who have even initiated a related protest.

Many of these conditions are pervasive across Ontario today, and all of them need not be present before a protest will occur. This is a sobering realization, which must be appreciated by government policy-makers and police officials. With these indicators, we can at least begin to identify why Aboriginal occupations and protests occur, under what circumstances, and what steps can be taken to reduce their likelihood and reduce the potential for violence in the future.

2.5 The Wider Costs of Aboriginal Occupations and Protests

The costs of our collective failure to resolve treaty and Aboriginal rights peacefully and effectively are potentially very high. The most obvious costs are the risk of violence and the expenditure associated with major police operations.

Yet the risk of violence and immediate economic costs are not the only consequences of Aboriginal occupations and protests. The true costs and effects must be evaluated in a wider social, legal, historical, and economic context. All of these dimensions must be considered in order to appreciate that we must find another way of resolving disputes.

A significant portion of this report is devoted to analyzing the social and legal consequences of our inability to address the root causes of Aboriginal occupations and protests. Yet, a comprehensive analysis of the wider costs and effects of occupations and protests must also consider their impact on both Aboriginal and non-Aboriginal individuals and communities, on the police, and on governments and other institutions.

2.5.1 Effect on Communities

Often, occupations and protests are accompanied by non-violent but significant disturbances and interruptions in the lives and daily routines of many people. These include road blockades, police stops, disruption of employment and the operations of local businesses, and even school closings. The residents of communities in and around Ipperwash, Caledonia, Oka, Burnt Church, and

elsewhere, all experienced considerable disruption simply through their proximity to a major occupation and the corresponding police operation. Aboriginal and non-Aboriginal communities alike felt these effects.

It is difficult to quantify, but still crucial to acknowledge, the general feelings of insecurity brought about by living through a major police action and the attendant social and community disruption. There is often considerable upheaval in settled routines and in expectations about life in one's community.

The feelings of anger and resentment that these personal and community disruptions generate cannot be underestimated. Many remember the tensions over a road blockade on the Mercier Bridge during the Oka standoff in 1990. Tension erupted into violence when members of the Kahnawake reserve erected a blockade on the bridge to show their support for the Oka protesters. The blockade effectively closed the road that carried commuters from the south shore of the St. Lawrence River to Montreal. Tempers flared, and there were violent confrontations between Aboriginal and non-Aboriginal protesters on the bridge.

In Caledonia, the local non-Aboriginal residents have stated that they fear for their safety and the safety of their families because of threats of physical violence from protesters, acts of vandalism, throwing of rocks at houses, and the presence of police, sometimes in riot gear, in residential areas. They say that the protesters have interfered with the quiet enjoyment of residential property by revving car engines, playing loud music, chanting, and beating drums, all in the middle of the night. They also say that property values in the town have dropped because of the dispute, and that the dispute has caused them to suffer bouts of anxiety.

2.5.2 Effect on First Nations and Aboriginal Peoples

Occupations and protests have a profound effect on the protesters and on the immediate community. Several witnesses at the evidentiary hearings spoke of the deep and enduring trauma of their experiences at Ipperwash. Some Aboriginal witnesses who were not present at the occupation were also distressed.³²

A lengthy or particularly painful occupation or protest can also effectively overwhelm a First Nation or Aboriginal community by preoccupying its members. People may focus on the occupation or protest, at the expense of other aspects of their lives, thus hindering the ability of the community to focus on larger issues.

Moreover, it cannot be assumed that every Aboriginal person or community supports every occupation or protest. Experience at Ipperwash and elsewhere has demonstrated that considerably divergent views exist within and between Aboriginal communities about the appropriateness or efficacy of occupations and blockades.

Aboriginal communities may be divided on a number of issues, including the legitimacy of the protesters' position, the protesters' tactics, the roles of First Nations political organizations, elected and traditional leaders, Elders, clan mothers, or the protesters themselves in directing or otherwise influencing the course of the protest or negotiations, whether or how to conclude the protest, and the roles of the police and "outsiders." Or, there may be consensus over the legitimacy of the rights being asserted, but disagreement over who is entitled to assert those rights or benefit from them. As a result, Aboriginal occupations and protests have the potential to disrupt relations within a First Nation or Aboriginal community.

Finally, experience has demonstrated that conflicts and disputes can be major setbacks in attaining the shared goal of harmonious relations based on understanding and reconciliation. Occupations and protests are often catalysts for the expression of racist or hateful sentiments on both sides of the barricade, with an attendant corrosive effect on Aboriginal/non-Aboriginal community relations.

2.5.3 Effect on Police

Aboriginal occupations and protests can have a significant effect on the police services, and they can often involve major police operations costing millions of dollars. The policing costs at Caledonia, for example, have been considerable. News reports have stated that the provincial government is giving the OPP more than \$20 million to cope with heavy policing costs related to the Caledonia standoff. The reports have quoted the current commissioner of the OPP as saying that

[t]he policing needs there are quite significant ... We [the OPP] have been deploying people from every detachment in the province, general headquarters, you name it. That has been an extraordinary burden for us to sustain.³³

In the absence of dedicated or new resources to help offset the costs of policing an occupation, the pressure on the police budget can be significant. The inevitable effect will be to reduce or strain police resources elsewhere.

The "hard costs" of policing occupations and protests do not include the important, perhaps incalculable, effects on police officers as individuals. Several police witnesses at the Inquiry testified about the enduring stress and trauma of their experience at Ipperwash.

2.5.4 *Effect on Police/Community Relations*

Aboriginal occupations and protests can also have a significant effect on police legitimacy, credibility, and community relations. The 1997 Independent Commission on Policing for Northern Ireland (the “Patten Report”) discussed the importance of legitimacy and credibility on the ability of the police to provide service to the community:

In a democracy, policing, in order to be effective, must be based on consent across the community. The community recognizes the legitimacy of the policing task, confers authority on police personnel in carrying out their role in policing and actively supports them.³⁴

In the non-Aboriginal community at Caledonia and Ipperwash, and presumably elsewhere, there was and continues to be a strong perception of unfairness in the application of the rule of law. The Inquiry repeatedly heard from non-Aboriginal people who believed that governments and police favoured the protesters. The perception of police unfairness can result in a considerable loss of credibility or legitimacy for an institution that depends on public respect and consent to do its job. For example, several participants at our community consultation in Thedford in June 2006 believed that there was a “double standard or system of law being applied to Aboriginal people, and suggested that Aboriginal people should be arrested and charged for activities that would lead to the arrest of a non-Aboriginal person.”³⁵ This view is significant, because a perception of unequal application of the law affects the degree of trust which non-Aboriginal communities will place in the ability of the police to protect them and to police them fairly.

This view is no doubt ironic to Aboriginal peoples who tend to believe that, historically, the police have been an instrument of their oppression, not their protectors. The Inquiry was told repeatedly that, within Aboriginal communities, policing at Ipperwash, Oka, and Gustafsen Lake has left a legacy of ill feeling. I heard that Aboriginal communities have a very different view of the rule of law, and that the police were often seen to be frustrating their attempts to exercise treaty rights, long held but seldom protected.

The perception of unfairness, and its effect on police credibility, is particularly acute within Aboriginal communities when racist comments or objects accompany police operations, as they did at Ipperwash.³⁶ Ovide Mercredi, former Grand Chief of the Assembly of First Nations, explained their effect in his testimony:

[It] does nothing to restore normal relations between the Aboriginal community and the police. It does the opposite. It creates a greater divide. It reinforces in our minds the suspicions we have about the police and their role ... And it confirms our observations about their conduct in our lives.³⁶ Trust, credibility, and consent are also crucially important if the police are to police occupations and protests effectively.

2.5.5 Effect on Public Institutions

Occupations and protests can affect other public institutions as much as they affect the police. For example, the inability of a government to prevent or end an Aboriginal occupation may also result in a loss of public confidence in government institutions. Communities affected by the occupation may feel that they do not have a voice in the government response or that their future is being decided without their input.

Aboriginal occupations can also dominate the political and public service agenda for extended periods. Caledonia, for example, has preoccupied provincial political, civil service, and police leaders for months, taking time away from other issues.

2.5.6 Economic Loss and Uncertainty

The failure to resolve Aboriginal land issues peacefully and constructively creates economic loss and uncertainty at the provincial, regional, and local level.

I have already discussed the costs of policing large-scale Aboriginal occupations and protests. Substantial though they are, they are not the only costs, and perhaps not even the largest. The provincial government recently estimated that the cost to the provincial government, identified as related to the Caledonia occupation, was \$39.3 million as of October 31, 2006.³⁷

The cost of Oka was even greater. The total cost for the federal and Quebec governments was more than \$150 million.³⁸

The economic effect of unresolved claims, and occupations and protests, is probably felt most deeply at the local level. The Inquiry was advised by the Municipality of Lambton Shores that the West Ipperwash land claim and the occupation of the park had a “devastating” financial impact.³⁹ The municipality cited loss of property values, loss of business revenues (including tourism), loss of municipal tax revenues, loss of Aboriginal and non-Aboriginal jobs, and difficulties for residents in obtaining mortgages and property insurance.

At the provincial or regional level, Aboriginal occupations and protests and/or the continuing uncertainty over land, treaty claims, and burial sites have a considerable economic effect. Occupations, protests, and continuing uncertainty over the ownership, control, or use of land and other resources have delayed or impaired economic opportunities in resource development, land development, fishing, forestry, and tourism. Importantly, both non-Aboriginal and Aboriginal people feel the effect of lost economic opportunities. The following two examples illustrate this point.

The first example concerns the development of the Seaton lands. The Seaton lands consist of about 1,270 hectares of publicly owned land in Pickering. These lands are being prepared for development by the provincial government as part of a land swap with a private developer. The Seaton lands were also likely the hunting, gathering, and fishing grounds of numerous First Nations, and they are known to contain Aboriginal heritage and burial sites.

In the summer of 2006, seven First Nation communities in Ontario filed a judicial review application against the provincial government and others in respect of the proposed development. The application requested that the court quash the Notice of Completion of the Class Environmental Assessment, which was carried out as part of the development of the site. This has delayed the development of the site and has created a legal predicament that could take years to resolve.

The second example is the confrontation between the Kitchenuhmaykoosib Inninuwug First Nation (KI First Nation) and the Platinex mining exploration company, which occurred at Big Trout Lake in Northern Ontario in early 2006. This example illustrates what happens when the provincial government does not take the lead in ensuring that meaningful consultation takes place with a First Nation before permitting resource development to proceed on traditional First Nation lands.

Platinex had been granted rights by the Ontario Ministry of Northern Development and Mines to do exploratory drilling for platinum on traditional lands of the KI First Nation, close to its reserve. A lengthy dispute between the First Nation and the mining company resulted in both parties' filing lawsuits against each other and seeking injunctions from the Superior Court.

Mr. Justice G.P. Smith granted the injunction requested by the KI First Nation and ordered Platinex to cease its exploration program at Big Trout Lake. In the course of his judgement, Justice Smith commented that

[o]ne of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.⁴⁰

It is important to note that the economic consequences of delayed or frustrated opportunities apply to Aboriginal peoples and non-Aboriginal peoples alike. Economic development is hindered for everyone if lands or resources are tied up in Aboriginal rights litigation or if they are the subject of an Aboriginal occupation or protest.

2.5.7 Effect on the Rule of Law

The “rule of law” is a term often heard in the context of Aboriginal occupations and protests. Most often, it is used by critics or opponents of Aboriginal protesters who argue that Aboriginal protesters are somehow above the law or not subject to the same laws as non-Aboriginal persons.

In this report, I hope to demonstrate that Aboriginal occupations and protests are much more complicated, legally, than many non-Aboriginal Ontarians probably realize. Very often, an occupation takes place because a First Nation or an Aboriginal community cannot determine the legality of their claim using existing procedures. In other words, the ownership of the land being occupied may still be unresolved. Aboriginal protesters may also assert that they have a “colour of right” to be on the land in question.⁴¹ In other cases, laws protecting the right to protest may protect the occupiers.

The Court of Appeal decision in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* in December 2006 discussed the complexity of the “rule of law” as it applies to Aboriginal occupations and protests. Justice Laskin spoke for the Court:

Throughout his reasons the motions judge emphasized both the importance of the rule of law and his view that “the rule of law is not functioning in Caledonia” and “the law has not been enforced.” As we said in our reasons on the stay motion, no one can deny the importance of the rule of law in Canada. The preamble to our Constitution states that Canada is founded on principles that recognize the rule of law. The Supreme Court of Canada has said that it is one of our underlying constitutional values.

But the rule of law has many dimensions, or in the words of the Supreme Court of Canada is “highly textured.” One dimension is certainly that focused on by the motions judge: the court’s exercise of its contempt power to vindicate the court’s authority and ultimately to uphold the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.

Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights. [Citations omitted.]⁴²

2.5.8 Effect on Harmonious Relations

The immediate cost of conducting relations with Aboriginal peoples through confrontations and over the barricades is very high. Unfortunately, all Ontarians risk even more if we leave long-simmering disputes with Aboriginal peoples unsettled until they boil over. The absence of effective and respectful means of resolving issues with Aboriginal peoples contributes to an atmosphere of insecurity and uncertainty with respect to the lands at issue, which threatens the well-being and the opportunities of all who have interests in these areas. It means that all Ontarians will continue to suffer lost opportunities to work cooperatively with Aboriginal peoples in the care and development of natural resources. And, perhaps most seriously, it means that we will fail to build and maintain a trusting relationship with the Aboriginal peoples in which all can take pride and from which all Ontarians can benefit.

Endnotes

- 1 Chiefs of Ontario Part 2 submission, para. 107.
- 2 John Borrows, “Crown and Aboriginal Occupations of Land: A History & Comparison” (Inquiry research paper), pp. 5-6.
- 3 Borrows, p. 24.
- 4 Borrows, p. 6.
- 5 Chiefs of Ontario Part 2 submission, paras. 107-8.
- 6 OPP Part 2 submission, para. 199.
- 7 Nishnawbe-Aski Police Services Board, “Confrontations over Resources Development” (Inquiry project), para. 30.
- 8 Jean Teillet, “The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario” (Inquiry research paper), p. 1.
- 9 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), p. 4.
- 10 Borrows, p. 34. Professor Borrows notes, dryly, that “[g]iven this history, it is passing ironic that Aboriginal blockades and occupations have received the lions-share of attention in the past few years when non-Aboriginal occupation of Aboriginal lands has been the predominant use of this device in Canadian history.”
- 11 Borrows, p. 25.
- 12 Rima Wilkes, “First Nation Politics: Deprivation, Resources, and Participation in Collective Action,” *Sociological Inquiry* (Nov. 2004): 570-589.
- 13 Don Clairmont and Jim Potts, “For the Nonce: Policing and Aboriginal Occupations and Protests” (Inquiry research paper), p. 20.
- 14 Ibid.
- 15 OPP, “Aboriginal Initiatives—Building Respectful Relationships” (Inquiry project), Appendix E. The OPP policy on policing Aboriginal occupations and protests, entitled “Framework for Police Preparedness for Aboriginal Critical Incidents,” defines these incidents as: “[An] incident where the source of conflict may stem from assertions associated with Aboriginal or treaty rights, e.g., colour of right, a demonstration in support of a land claim, a blockade of a transportation route, an occupation of local government buildings, municipal premises, provincial/ federal premises or First Nation buildings.”
- 16 Clairmont and Potts, pp. 27-8.
- 17 Geoffrey York and Loreen Pindera, *People of the Pines* (Toronto: McArthur & Company, 1991), p. 405. Two additional deaths have been attributed to Oka: Two elderly Mohawk men did not recover from medical conditions arguably precipitated by their experiences at Oka.
- 18 Clairmont and Potts, p. 18.
- 19 Borrows, p. 35.
- 20 Borrows, pp. 22-60. See generally Professor Borrows’s inventory of Aboriginal land and treaty disputes.
- 21 Health Canada. “First Nations Comparable Health Indicators, January 2005 ... First Nations and Inuit Health,” <http://www.hc-sc.gc.ca/fnih-spni/pubs/gen/2005-01_health-sante_indicat/index_e.html>.
- 22 *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para. 69.

- 23 Statistics Canada. 2005. "Adult correctional services, 2003/04." *The Daily*. December 16, 2005, <<http://www.statcan.ca/Daily/English/051216/d051216b.htm>> (accessed December 2006).
- 24 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (Inquiry research paper), p. 16.
- 25 Statistics Canada. 2006. "Aboriginal peoples as victims and offenders, 2004" *The Daily*, June 6, 2006, <<http://www.statcan.ca/Daily/English/060606/d060606b.htm>> (accessed December 2006).
- 26 Ibid.
- 27 Michael Coyle, "Results of Fact-Finding on Situation at Caledonia," April 7, 2006 (on file with the Inquiry). This history is based, to a large extent, on a report by Professor Coyle, an independent fact-finder appointed by the federal government to report on Caledonia.
- 28 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, Ontario Court of Appeal, released December 14, 2006 [*Henco Industries*].
- 29 See generally <<http://www.caledoniawakeupcall.com>> (accessed September 14, 2006).
- 30 McGuinty, Hon. Dalton (Premier, Minister of Research and Innovation). "Oral Questions." In Ontario, Legislative Assembly. *Legislative Debates (Hansard)*. 38th Parl. 2nd Sess. (April 19, 2006). <http://www.ontla.on.ca/hansard/house_debates/38_parl/Session2/L062.htm#P474_95201>.
- 31 Professor Don Clairmont and retired RCMP Inspector Jim Potts contributed significantly to this analysis.
- 32 Borrows, p. 58. Professor Borrows discussed the effect of trauma on Aboriginal peoples in his paper for the Inquiry. Citing the work of Dr. Judith Herman, Clinical Professor of Psychiatry at Harvard Medical School, Professor Borrows discussed the impact on contemporary occupations and protests of denying Aboriginal peoples' experience and rights for generations. He noted that "there is little awareness in Canada's official history of the lived experience of trauma by Aboriginal peoples, and how this continues to consume present generations."
- 33 Daniel Nolan, "OPP to get \$20m for policing in Caledonia," *Hamilton Spectator*, January 4, 2007.
- 34 Independent Commission on Policing for Northern Ireland, Rt. Hon. C. Patten, Chair, *A New Beginning: Policing in Northern Ireland* (London: 1999), p. 22.
- 35 Community Consultation at the Thedford Arena, June 21, 2006 (Inquiry event).
- 36 For a full description of this issue, see vol. 1: *Investigation and Findings* of this report.
- 36 Ovide Mercredi testimony, April 1, 2005, Transcript p. 97.
- 37 Ontario Secretariat for Aboriginal Affairs, "Six Nations (Caledonia) Costs to Date," <http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/news_061102.html> (accessed December 2006). Costs include the purchase price of the Douglas Creek Estates Property, policing costs, acquisition of the interests of other builders in the Douglas Creek lands, and other costs. It is important to note that these figures only represent the costs to the provincial government.
- 38 York and Pindera, p. 405. Note that these are 1990/91 figures.
- 39 Municipality of Lambton Shores Part 2 submission, p. 26.
- 40 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation, et al.* Released July 25, 2006 (not yet reported), at paras. 96-7.
- 41 This is a legal defence to a criminal charge of trespass, in which the person charged reasonably believed that he or she had title to or an interest in the land, which entitled him or her to do the act complained of.
- 42 *Henco Industries*, at paras. 140-2.

TREATY RELATIONS IN ONTARIO

The events that led to the death of Dudley George arose from a longstanding dispute about treaty and Aboriginal rights. Occupations of land and blockades of transportation facilities by Aboriginal people occur when members of an Aboriginal community believe that governments are not respecting their treaty or Aboriginal rights, and that effective redress through political or legal means is not available. It is typical of these events that governments have failed to respect the rights at issue or to provide effective redress, for a very long time, and a deep sense of frustration has built up within the Aboriginal community.

Treaty and Aboriginal rights can only be understood in an appropriate historical and legal context. Building a better relationship with Aboriginal peoples requires that governments and citizens recognize that treaties with Aboriginal peoples are the foundation that allowed non-Aboriginal people to settle in Ontario and enjoy its bounty. Nearly all of the lands and inland waters in Ontario are subject to treaties between First Nations and the British and Canadian governments. Beginning in the late 1700s and continuing right up to the 1920s, it was through treaties that the Algonquin, Ojibwe (or Chippewas, to use the British term), Odawa, Cree nations, and the Haudenosaunee (the Six Nation Iroquois Confederacy) and the governments, first of Great Britain and then of Canada, agreed to regulate their relationships and the terms on which land and resources would be shared. These treaties are not, as some people believe, relics of the distant past. They are living agreements, and the understandings on which they are based continue to have the full force of law in Canada today.

The treaty process held out the promise of a relationship based on mutual respect and common interests. However, once the settler population came to outnumber the Aboriginal population, and the Indian nations were no longer needed as military allies to defend the colony, respect for the treaties on the non-Aboriginal side gave way to policies of domination and assimilation. For over a century, governments (both federal and provincial) either ignored treaty obligations or interpreted them unilaterally, while the Aboriginal signatories did not have access to political or legal means of addressing treaty claims. The experience of the Chippewas of Kettle and Stony Point First Nation illustrates the frustration and anger that can arise from the failure of federal and provincial governments to take treaty obligations seriously. It also illustrates how failure to educate Ontario citizens on the treaty relationships that lie at the foundation of their province can

contribute to misunderstanding and conflict. One of the lessons of Ipperwash is the realization that all of us in Ontario, Aboriginal and non-Aboriginal, are treaty people.

Ontario has the largest Aboriginal population of any Canadian province or territory. But it is also the province in which the federal government is least involved in Aboriginal affairs, despite the fact that it is the Crown party to treaties throughout the province and has exclusive jurisdiction over “Indians, and lands reserved for the Indians.”

For over thirty years, Canada has been engaged in a process of reforming law and policy with respect to Aboriginal peoples, aimed at respecting their distinct rights and improving their economic security and opportunities. Though this process has not produced a comprehensive constitutional resolution of Aboriginal issues, it has led to the recognition of Aboriginal and treaty rights in the Constitution of Canada and to articulating these rights in the courts. These developments form an important backdrop for what can and should be done in Ontario to renew and implement treaty relations, and to recognize the rights of all Aboriginal peoples in Ontario and to ensure that they have an appropriate share in the management of the resources of the province and the benefits from them.

There are three areas where reform in Aboriginal relations is most needed in order to prevent the kind of incident that occurred at Ipperwash. The first area is disputes over treaty rights with respect to lands and waters. I believe that unless a fair, expeditious, and adequately supported approach is established, involving both the provincial and federal governments, Ontarians can reasonably expect to see more incidents such as occurred at Ipperwash and Caledonia.

The second area is the regulation and development of natural resources on Aboriginal traditional lands and waters. To avoid future conflicts, provincial management of natural resources must take into account the rights and interests of Aboriginal peoples more effectively. I believe that there are ways of sharing and co-managing natural resources that are consistent with Aboriginal and treaty rights while serving the interests of First Nations and all the people of Ontario.

The third area is the protection of and respect for Aboriginal heritage, burial sites, and other sacred sites. The Inquiry heard evidence that one reason for the occupation of Ipperwash Provincial Park was the disrespect shown for a burial site.

I will propose legal, policy, and institutional reforms in these three areas and in areas of education and provincial leadership and capacity in the chapters that follow. The potential scope for discussion of treaty and Aboriginal rights is very wide. I have confined my recommendations to those I consider essential to preventing future flashpoint events and to building a better relationship with Aboriginal peoples in this province. I believe that these measures are the key to

an honourable and effective partnership with Aboriginal peoples in Ontario which draws upon the best that we have done together in the past and promotes the best that we can achieve together in the future.

3.1 Learning from Ipperwash

Volume 1 of this report contains a detailed history of the Stoney Point and Kettle Point reserves. In this volume, I comment on the lessons to be learned from that history; lessons that point to the need for a new approach to Aboriginal relations in Ontario.

The history of the Kettle and Stony Point First Nation is unique in some respects, but its main contours are common experiences in Ontario. There are moments of joint achievement and agreement, but much of the story is about shifts and reversals in policy, unfulfilled promises by British, Canadian, and Ontario governments, and stress, disappointment, and frustration for First Nations peoples. From the tragedy of Ipperwash, Ontario can learn much about what is needed to forge a respectful and mutually beneficial relationship with Aboriginal peoples in the province.

3.1.1 The Importance of the Royal Proclamation and the Treaty of Niagara

The fundamental commitment of the *Royal Proclamation* of 1763 was that First Nations were to be treated with honour and justice. In it, the British government promised to protect Aboriginal lands from encroachment by settlers. Settlers could settle only on land that an Indian nation had ceded to the Crown. A year later, when Sir William Johnson came to Niagara Falls to explain the *Royal Proclamation* to 1,500 Anishnabek chiefs and warriors, he consummated the alliance with the Anishnabek (the Treaty of Niagara) by presenting two magnificent wampum belts, which embodied the promises contained in the Proclamation.

As I explain in more detail in Part 1 of this report, the Treaty of Niagara was entered into in accordance with Aboriginal protocol, including speeches and wampum belts. The British, through their representative Sir William Johnson, gave the Anishnabek two wampum belts, the “Great Covenant Chain Belt,” and the “Twenty-four Nations Belt.” With the Great Covenant Chain Belt, the British promised that the Anishnabek would not become impoverished and their lands would not be taken. The Anishnabek promised in turn to be loyal and to support the King in both peace and war.

The Twenty-Four Nations Belt, also accepted by the Anishnabek, has twenty-four human figures representing the Anishnabek Nations drawing a British

vessel laden with presents from across the Atlantic and anchoring it to North America. This Belt promised that the British would always provide the necessities of life should the Anishnabek find themselves in need.

The *Royal Proclamation* and the Treaty of Niagara are not obsolete relics. The Proclamation remains part of constitutional law in Canada to this day. In 1982, it was incorporated into the *Canadian Charter of Rights and Freedoms*. Section 25 of the Charter states that the rights and freedoms recognized by the *Proclamation* take precedence over other rights and freedoms in the Charter. The promises of protection and sustenance made at Niagara remain the basis for the honourable and beneficial relationship with Aboriginal peoples toward which we should be working.

3.1.2 *The Huron Tract Treaty*

Ontario was the first part of Canada in which the British government (and subsequently, the Canadian government) consistently followed the rule, set down in the *Royal Proclamation*, that settlement on Indian lands could take place only on lands that had been ceded or sold to the Crown. Compliance with this rule was certainly an effective means of acquiring First Nations lands in a peaceful manner. Indeed, avoiding war and maintaining peaceful relations was a common interest of the parties to the agreements through which Indian lands were surrendered. But beyond that common interest, the interests of the parties diverged sharply, as did their understanding of these agreements.

Many Indian Nations from the Great Lakes assisted the British against the Americans in the War of 1812. After the War, the British were concerned that the area north of Lake Erie and south of Lake Huron was vulnerable to attack by the Americans. As a result, they wanted to bring settlers into this area, in what is presently southwestern Ontario. The pace of treaty making quickened after the War of 1812 in order to accommodate new settlers in this area. The Huron Tract Treaty of 1827 which resulted in the creation of the Kettle Point and Stoney Point reserves was one of these post-1812 treaties.

The Huron Tract Treaty was similar to other land-surrender treaties entered into in the late 1700s and early 1800s by First Nations in the southern and eastern regions of what is now Ontario.¹ Essentially, the British saw these treaties as real estate transactions through which land needed for incoming settlers could be cleared of native title at minimum cost, with the Indians confined to small reserves. In the worldview of Aboriginal peoples, however, land was not a commercial commodity that could be bought and sold. They knew that an influx of settler farmers was imminent, and they wanted to achieve the best terms they could

to deal with it. In exchange for the goods and money needed for the new economy developing around them, they were prepared to share most of their ancestral lands with the newcomers, providing they could secure some reserve lands for their exclusive use.

The detailed account of the negotiations leading up to the Huron Tract Treaty in Volume 1 of this report shows what a tough bargain the British government struck with the Chippewa chiefs and leaders. The First Nations ended up ceding much more land than originally intended, and for considerably less compensation than their people had hoped to receive. In return for ceding over two million acres of their land, they retained four reserves for their exclusive use and occupation, which constituted less than one percent of their land. Instead of receiving cash compensation, they had to settle for half of this payment in goods. There was provision for reducing the payments if the eligible population declined, but there was no provision for increasing the payments if the population grew. The Chippewa had requested the services of a blacksmith and an agricultural instructor, but the obligation to provide these services was omitted from the treaty.

It is evident from the terms of the Huron Tract Treaty that, at the time it was negotiated, there was no commitment on the part of the settler government to a sustaining and long-term relationship with the Chippewa. The small reserves for their exclusive use were not seen as a basis for self-sustaining and flourishing communities. The First Nations were expected to decline in numbers, and eventually, to disappear. No provision was made for their participation in the economy being developed by the incoming settlers. In the terms of this treaty, and many others like it, lie the seeds of the disappointment and discontent of succeeding generations of First Nations peoples in Ontario.

3.1.3 Control and Reduction of the Kettle Point and Stoney Point Reserves

In the early 1800s, once peace was secured with the United States and settlers began to pour into British North America, state policy in Canada with respect to Aboriginal peoples shifted away from alliances and covenants of mutual respect toward control and assimilation. Treaty-making with First Nations continued to be the method of acquiring land for settlers and their economic projects, but now the objective of the settler state was not only to gain title to Aboriginal lands, but also to control First Nations societies on their reserve lands and work toward their assimilation into the mainstream European society. This policy, though rejected by Aboriginal peoples, prevailed in all parts of Canada for nearly a century and a half, until the end of the 1960s.²

The shift in policy had unfortunate consequences for the communities on

the Kettle Point and Stoney Point reserves, and for other First Nations in the province. The policy of enfranchisement, as incorporated into the *Indian Act*,³ required Indians who achieved a certain level of education or a professional designation (such as doctors or lawyers) to give up their Indian status and leave the reserve. This meant that members of the Kettle Point and Stoney Point communities had to choose between participating in the prosperous mainstream society developing around their reserves and maintaining their attachment to the society that was so central to their identity. Indian women who married men who were not registered as members of their bands also lost their status. The creation of a class of “non-status” persons caused tension within reserve communities and fragmented many families.

The *Indian Act* regime also meant that the federal government and its locally based Indian Agents exercised a great deal of control over the governance of First Nations, including the power to define the structure and membership of Aboriginal communities. This power significantly undermined the autonomy of the Kettle and Stoney Point people. The British Indian Department administered the communities whose chiefs signed the Huron Tract Treaty as one large band. For many decades after Confederation, the Kettle Point and Stoney Point people pressed the government to treat them as a band separate from the much larger band on the Sarnia reserve. It was not until 1919, when the Department of Indian Affairs concluded that separation would make it easier to obtain lands for the expansion of the city of Sarnia, that the people living on the Kettle Point and Stoney Point reserves were recognized as a separate band (subsequently called the Kettle and Stony Point First Nation).

Beginning in 1912, the Kettle Point and Stoney Point communities were under pressure to surrender some of their reserve lands to the Crown. The pressure came from the interest of the surrounding community in the commercial and recreational potential of the sandy beaches on the reserve. In 1927, part of the Kettle Point beachfront was surrendered, and in 1928, all of the Stoney Point beachfront was surrendered. Volume 1 of this report provides the details of these land surrenders.

These reductions in the Kettle Point and Stoney Point reserve lands were characteristic of a government approach, both federal and provincial, in which the economic interests of Aboriginal peoples were subordinate to the interests of the non-Aboriginal community. Agents of the federal Crown authorized and then arranged for the sale of the reserve lands to private developers, at extremely low prices. The developers then sold the property at a considerable profit. In the case of the Stoney Point beachfront, it was sold to the Province of Ontario, in 1936, to create Ipperwash Provincial Park. The province paid nearly three times the price

the band had received for it. In these transactions, the federal Crown showed little interest in the economic potential the land represented for Aboriginal peoples, at a time when the Aboriginal people had little knowledge of their legal rights and the *Indian Act* prevented them from obtaining independent legal advice.⁴

It is important to bear in mind the constitutional and legal context in which a sale of Indian lands occurs. Under the *Royal Proclamation* of 1763, a First Nation cannot sell its land directly to private interests. Only the Crown (in post-Confederation Canada, this means the Government of Canada) can arrange for the sale of Indian lands. The *quid pro quo* in denying Aboriginal people the right to sell land directly is the obligation of the Crown to act honourably in such land transactions and in a way that secures the best interests of the Aboriginal people. This obligation is what is referred to in law as the fiduciary duty of the Crown. Looking back on the circumstances of the 1927 and 1928 land surrenders at Kettle Point and Stony Point, it is difficult to see anything honourable in the way the sale was carried out or that the best interests of the First Nation peoples were served by the meagre return they received from the sale of such desirable property.

The failure of the Crown to deal honourably with the Kettle and Stony Point First Nation was not an isolated incident. The Supreme Court decision in the 1984 *Guerin* case⁵ was required to remind the Crown of its fiduciary obligation with respect to Aboriginal lands. Notwithstanding that reminder by the Supreme Court, alleged breach of the fiduciary obligation of the Crown remains a central issue in many of the unsettled land claims in Ontario.

In the 1990s, the Chippewas of Kettle and Stony Point First Nation were finally able to challenge the 1927 land surrender in the courts. Although the courts found the surrender of the land legally valid, the judges were disturbed that the transactions had about them “the odour of moral failure.”⁶ The Ontario Court of Appeal suggested that the “tainted dealings” might afford grounds for the band to make out a case of breach of fiduciary duty against Canada.⁷ In 1997, the Indian Claims Commission, the federal body that deals with Specific Claims, found that in allowing an “exploitive transaction” the Crown did breach its fiduciary obligation. Efforts to reach a mediated settlement of claims arising from the 1927 surrender continue.

3.1.4 Failure to Protect Burial Grounds

Soon after Ipperwash Provincial Park was created, the band council passed a resolution to request that the federal Indian Affairs department ask Ontario to preserve and protect their old burial site on the park grounds. Nothing had been

done up to the summer of 1995, when Dudley George and others threatened to occupy the park. The federal government never pressed the province, and provincial authorities were never convinced that the burial ground existed, despite the opinions of archaeologists that the human remains found in the park were probably Aboriginal.

In my view, it is striking that the provincial authorities who dealt with this issue over many years showed no respect for the Chippewas' knowledge of their own history. Professor Darlene Johnston's research paper made it clear that this disrespect for the sacred places of Aboriginal peoples goes back to the earliest colonial days.⁸ In the 1600s and 1700s, the disrespect arose from rejection of the Aboriginal peoples' spiritual beliefs by Christians. The desecration of Aboriginal sacred sites by Christians was so destructive that the Anishnaabeg people "became reluctant to reveal their sacred places to the newcomers."⁹ On occasions when the Anishnaabeg people did inform government officials about the location of their burial sites, as they did in the case of the Ipperwash site, the reaction was dismissive.

The desecration of another burial ground, the cemetery on the Stoney Point reserve taken over by the Canadian military in 1942, was not the result of denying Aboriginal knowledge of the location of their burial sites. This was unmistakably a cemetery, with tombstones. It was (and still is) near the centre of the former Stoney Point reserve, and it was still used by the community. After the military appropriated the reserve and created Camp Ipperwash, almost all of the tombstones were knocked over and some were damaged by bullets. The military did nothing to maintain the cemetery grounds. The area was overgrown with weeds and the fence was left to collapse.

I find it hard to imagine that members of the Canadian military would have shown the same disrespect for a non-Aboriginal cemetery. This desecration continues to be a painful wound. Joan Holmes, our expert witness on Aboriginal rights and Aboriginal ethno-history, told the Inquiry that, for Aboriginal people, the desecration of the burial grounds was "symbolic of their loss of ancestral territory and their inability to maintain connections with their cultural heritage."

3.1.5 The Appropriation of the Stoney Point Reserve and the Failure to Give It Back

The appropriation of the Stoney Point reserve by the Government of Canada in 1942 was unprecedented in Canadian history. Never before or since has an entire reserve, set aside by treaty for the exclusive use of a First Nation people, been simply taken away from them. The appropriation was contrary to the clearly expressed

wishes of the Chippewas of Kettle and Stony Point First Nation. It was also contrary to the promises in the treaty and the procedures and principles required to be observed by the Crown in its dealings with Aboriginal lands. The appropriation was carried out as an exercise of emergency powers under the *War Measures Act*,¹⁰ which were interpreted such that the government was entitled to override the treaty rights of the Chippewas of Kettle and Stony Point First Nation.

What I find so disturbing in reviewing the evidence of this appropriation is the stark contrast between the ease with which First Nations people gave their loyalty and trust to the government and the ease with which the Government of Canada betrayed that trust. At the time of the appropriation, many of the Kettle and Stony Point men were overseas, serving in the armed forces. The Kettle and Stony Point petitions and letters of protest from that time contain many expressions of commitment to the war effort, and to the “reason our boys enlisted,” namely the protection of home and country. They urge the government to look for other land in the region to serve military training needs. The evidence indicates that the federal Indian Affairs Department saw advantages in having the military take over the Stoney Point reserve and in moving the resident families to Kettle Point. Squeezing more people on to the Kettle Point reserve provided the “perfect opportunity” for removing “white people” (their term for Aboriginal people who had lost their Indian status) from that reserve.

The late Mrs. Beattie Greenbird was an elderly resident of Stoney Point when she wrote a letter, which I quoted in Volume 1. That poignant quote is worth repeating here, because it expresses so clearly her people’s profound sense of betrayal:

The animal has laws to protect them not to be disturbed or molested on the ground. Us Indians has no law we are classed way down below animal.

When the Department of National Defence appropriated the reserve from the Chippewas of Kettle and Stony Point First Nation in 1942, it promised to return it to them after the war if it was no longer required for military purposes. Today, over sixty years after the end of the war, Camp Ipperwash has not yet been formally handed back.

Three generations of Kettle and Stoney Point people testified at the Inquiry. Their testimony showed how harmful the appropriation of their reserve has been for their community. Before they lost their land, the residents were part of a self-sustaining community. The community operated to a great extent through consensus and its members had a deep spiritual attachment to their land. The forced

move to the Kettle Point reserve was devastating for them, emotionally and materially. They were removed from the land they cherished, and which was central to their sense of identity. On the tiny lots at Kettle Point, they could no longer sustain themselves. Adding to demoralization and material loss, the appropriation has been the source of serious tensions between the people living at Kettle Point and the people living at Stoney Point, and within the Kettle and Stony Point First Nation community. These tensions became acute when a group of people, which included Dudley George, decided to occupy the military base. As a result of these tensions, it has been difficult for the Kettle and Stony Point First Nation to develop a common front in negotiating the return of the Stoney Point reserve.

3.2 Treaty Relations in Ontario: A Story of Broken Promises

3.2.1 *Ontario: Home of Canada's Largest Aboriginal Population*

As I have mentioned, Ontario has the largest Aboriginal population among the provinces and territories of Canada.¹¹ The 2001 census reported that 188,315 Ontario residents self-identified as Aboriginal.¹² The Aboriginal population constitutes 1.7% of the population of Ontario. Aboriginal people represent a greater percentage of population in the northern territories and provinces west of Ontario, but Ontario has the largest aggregate number of Aboriginal people.

Despite their numbers, and despite their critical role in the development of the province, the government and the public have failed to appropriately recognize Aboriginal Ontario throughout much of the history of the province. This is a root cause of the large backlog of issues that remain unsettled with First Nations. These unsettled issues generate the conflicts seen in Aboriginal relations in Ontario today.

There are thirteen distinct groups of First Nations peoples in Ontario, each with their own language, customs, and territories: the Algonquin, Mississauga, Ojibwe, Cree, Odawa, Pottowatomie, Delaware, and the Haudenosaunee Six Nations—Mohawk, Onondaga, Onoyota'a:ka, Cayuga, Tuscarora, and Seneca. These are the Nations that entered into treaties, first with Great Britain and later with the governments of Canada and Ontario, which established the terms on which non-Aboriginal settlers and Aboriginal peoples would share the lands and resources of Ontario.

Most Aboriginal people in Ontario belong to one of the founding treaty Nations. Some live in First Nations communities or reserves; some do not. The administrative units of colonial administrators, and after Confederation those under the *Indian Act*, broke up the indigenous nations into smaller units called

bands. Bands are associated with reserves, which are also called “First Nation communities.” The federal government officially recognizes 127 First Nation communities in Ontario. However, the Chiefs of Ontario, which is the most comprehensive coordinating body for Ontario First Nations, recognizes 134.¹³ First Nation communities tend to be located in the rural areas of Ontario. Only thirty-two of the 127 First Nations communities recognized by the federal government are within 50 kilometres of a major urban centre. Thirty-one are accessible only by air. In 2004, the Department of Indian and Northern Affairs Canada reported that 79,186 individuals among the registered Indian population in Ontario of 163,654 were living on reserves.¹⁴

In recent years, rising levels of education and the decline of discrimination in the labour market have greatly increased the number of First Nations people living in cities. Nevertheless, most off-reserve First Nation people retain a strong connection with their First Nation community.

Two other demographic facts about the Aboriginal population of Ontario should be noted: It is growing rapidly, and it is relatively young. Between the 1996 Census and the 2001 Census, the Aboriginal population in Ontario increased by 33.1%. During the same period, the non-Aboriginal population increased by about 5.7%.

Recent developments in the recognition and status of Aboriginal peoples have influenced individuals to self-report as Aboriginal, which accounts for much of the increase in the Aboriginal population as reported in the census.¹⁵ The median age in the Aboriginal population in Ontario is 27.9, compared with 37.1 for the non-Aboriginal population. These demographic features are similar throughout Canada.¹⁶

So, the Aboriginal population of Ontario is young and growing, and though moving off-reserve in growing numbers, even then continues to identify with Aboriginal heritage and maintain ties to First Nation communities. And most of these First Nation communities are in rural areas, which are the focus for unsettled issues concerning land and treaties. These are also areas where new economic development is growing, much of it on lands in which First Nations have interests. These facts, considered together, indicate significant potential for more situations like Ipperwash.

The reforms I recommend in this report deal mostly with issues concerning the First Nations who were parties to treaties in Ontario. However, my proposals also address the concerns of Métis people in Ontario who have Aboriginal rights relating to resources. A small number of Aboriginal people in Ontario do not belong to a First Nation with treaty rights in Ontario or to a Métis community. Under the Canadian Constitution and the *Indian Act*, they have important

Aboriginal rights, but because they do not relate to the land and resource issues that produce conflicts like Ipperwash, I considered them to be outside my mandate.

3.2.2 *Treaties in Ontario and the Failure to Honour Them*

Nearly all of the land in Ontario is subject to treaties entered into by the Crown and First Nations. The treaty-making process, as I have noted, was based on the promises made to First Nations at Niagara Falls in 1764 with respect to following the principles of the 1763 *Royal Proclamation*. The first set of treaties was made in the late 1700s and early 1800s in what is now Southern Ontario.

The written record of these early treaties is extremely sparse. What record exists is beset with uncertainty.¹⁷ For example, the 1783 treaty with Mississaugas in the Bay of Quinte describes the land involved as extending “so far as a man can travel in a day.” Another treaty, negotiated a year later and relating to a large portion of land extending from Lake Ontario to Lake Simcoe, entirely omits any description of the area surrendered.¹⁸ A few years later, the governor, Lord Dorchester, declared the document invalid. The matter lay unresolved for over a century, until the negotiation of the Williams Treaty of 1923 addressed a number of outstanding land cession issues in Southern Ontario. Many other issues stemming from these early land surrender agreements remain unresolved and they are the source of many land claim issues that continue to this day.

The First Nation parties to most of these early land cession agreements were Ojibwe-speaking groups, usually referred to as Mississaugas in southern and central Ontario and as Chippewas farther west.¹⁹ The British wanted these Ojibwe lands for the waves of settlers moving into Upper Canada after the American Revolution and after the War of 1812. The settlers were not all European; some were Aboriginal. In order to obtain land in Canada for its Haudenosaunee (Six Nations) allies in the Anglo-American War, the British negotiated treaties with the Mississaugas. It was through such agreements, in 1783 and 1784, that the British were able to grant land at the eastern end of Lake Ontario to Mohawks led by John Deserontyon, and land along the Grand River to a large group of Six Nations people led by the Mohawk chief, Joseph Brant. The latter was the basis of the “Haldimand Grant” along the Grand River.

From the perspective of the Crown, the land cession treaties negotiated over the seventy-year period from the 1780s to 1854 were a success. They secured for new settlers, through peaceful means and at the lowest possible cost, most of the land in what is now the southern part of Ontario. But for the First Nations left with less than one percent of their original lands, the treaties were a source of

bitterness and disappointment, much of which stemmed from the inability and unwillingness of the colonial government to take the treaties seriously and to be bound by them. Thousands of settlers were squatters on reserve lands and the government took no steps to remove them. In 1840, the Six Nations Grand River reserve alone had, by one count, 2,000 non-Aboriginal settlers occupying over a quarter of the land, without having purchased it, and without the consent of the Iroquois Confederacy representing the Six Nations.²⁰ And the Crown, under pressure from non-Aboriginal interests, sold off portions of reserves set aside for First Nations, without their consent.

Colonial administrators and legislators were aware of the failure to protect the treaty interests of First Nations. There were numerous inquiries and reports. An 1840 report described “nothing less than the complete political and legal abandonment of Indians in Upper Canada.”²¹ An 1844 parliamentary inquiry chaired by Sir Charles Bagot reaffirmed the principles of the *Royal Proclamation* and concluded that Upper Canada’s government “had failed to protect First Nations from widespread theft of their lands, leaving them in poverty.”²² But nothing was done to redress these abuses, many of which remain in effect to this day.

Poverty in the First Nations stemmed not only from losing lands reserved for them, but also from their exclusion from the economy developing on traditional lands beyond their reserves. Traditional lands are the lands on which the Crown recognized Aboriginal title when it made a treaty with the First Nation owners of those lands. While these off-reserve traditional lands are Crown lands, the control over them by the Crown is burdened by treaty obligations. Virtually all of the treaties were made with the assurance to the First Nation that its people could continue to sustain themselves on their off-reserve traditional lands.²³ This is one reason they were willing to cede such vast areas of land to the Crown for relatively little compensation in goods or money. This condition was rarely set down in the written record of the land cession, but reports by treaty commissioners frequently recorded that a promise of continued access to traditional lands had been made orally.

First Nations continued to have access to their traditional lands, both for economic purposes such as hunting, fishing, and trapping and as places to live, for a considerable number of years after agreeing to land cession treaties. But as the frontier of European settlement steadily advanced, they found themselves pushed onto reserves and excluded, by law and policy, from sharing in their traditional lands. There was no room for an Aboriginal economy in the economy European settlers had begun to develop in Southern Ontario. When First Nations took up farming and became good at it, they were pushed farther north, to less fertile areas, to make way for white farmers.²⁴ Confining Aboriginal peoples to small,

unproductive reserves was part of a colonial policy which, now that the First Nations lands had been secured, aimed for the disappearance of First Nations as identifiable and self-sustaining societies.

The Robinson Treaties of 1850 marked a turning point in the Ontario treaty-making process. William Robinson negotiated the terms, on behalf of the Crown, with the Ojibwe peoples along the north shore of Lake Superior and the north and east shores of Lake Huron and Georgian Bay. The treaties covered all the lands that drain south into the Great Lakes from the northern Ontario watershed.

The Robinson Treaties differ in two respects from the land cession treaties which, by 1854, covered most of Southern Ontario. First, in negotiating them, the aim of the Crown was not to secure land for settlement, but rather to open up Northern Ontario for mining. The treaties were prompted by the Ojibwes' resistance to the mining licenses issued for locations on Lake Huron and Lake Superior.²⁵ Second, the Robinson Treaties (one for Lake Superior and the other for Lake Huron) were much more detailed documents than the earlier land cession agreements had been. Among other things, the Robinson Treaties, in addition to identifying the reserves which the Ojibwe would have for their exclusive use, also specifically promised continued hunting and fishing rights in the ceded territories.²⁶ That promise was William Robinson's rationale for paying less for Indian land than had been paid under previous treaties.²⁷

The Robinson Treaties contained more detail, but the colonial government was no more inclined to abide by the terms than it had been in the case of the land cession treaties in the southern part of the province. Its refusal to consider the treaties legally binding was subsequently approved by the courts. In 1897, when litigation arose over the annuities to be paid to First Nations under the Robinson Treaties, the highest court in the Empire had this to say about treaties with Indians:

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province.²⁸

Until the 1980s when the Constitution of Canada was amended to recognize and affirm treaty rights, this dismissive treatment of treaties prevailed in Canadian courts. In 1985, the Chief Justice of Canada, Brian Dickson, commenting on

past judicial treatment of Aboriginal treaties, said that it “reflected the biases and prejudices of another era in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.”²⁹ The fact that prejudice against Aboriginal peoples prevailed in Canadian courts for so long helps to explain why it proved futile for First Nations to challenge breaches of treaty obligations in the courts.

The Robinson Treaties were pre-Confederation treaties, formally entered into by the British Crown, but the obligations and the benefits flowing from them accrue to Canada. They also served as the template for the treaties Canada entered into with First Nations after Confederation—the “numbered treaties.” These treaties, numbered from one to eleven, were made with First Nations in northern and western Canada between 1871 and 1921.

Treaty 3, also known as the Northwest Angle Treaty, was negotiated with Anishinaabe people called the *Saulteaux* in 1873. It covered 55,000 square miles, north from Thunder Bay to Sioux Lookout, down to the US border, and over to the Manitoba border.

In negotiating Treaty 3, the *Saulteaux* were well aware of the value of their land and drove a hard bargain with the treaty commissioners from Ottawa. They did not view the treaty process as facilitating a sale of their lands, but rather as a means of controlling the scope of Crown encroachments on them. Fifteen years later, they would be shocked by the decision in *St. Catherine's Milling*,³⁰ in which the court ruled that once the treaty had been signed, the *Saulteaux's* traditional lands had become the exclusive property of the provincial government. As a result, the federal government lost its authority to carry out the treaty obligations of the Crown. In 1929, forty-one years after the treaty was signed, Canada and Ontario finally agreed on reserve boundaries. By then, Ontario had leased to private resource companies much of the more valuable land in the reserve locations agreed to by the federal government and the First Nations under the treaty.³¹

Following the ruling in *St. Catherine's Milling* in 1888, the federal and provincial governments passed legislation requiring that future treaties with Indians in Ontario have the concurrence of the province.³² Thus, in the negotiations that led to Treaty 9 in 1905, one of the commissioners on the Crown side represented Ontario. Treaty 9 covers lands north of the areas covered by the Robinson Treaties, all the way over to the Quebec border in the east, north to James Bay, and over to Treaty 3 lands in the west. Adhesions to Treaty 9 in 1928/29 covered the rest of northern Ontario up to Hudson Bay and over to the Manitoba border.

Ojibwe and Cree peoples requested Treaty 9, seeing it as a means of controlling interference with their traditional economy from the industrial and railway development that was rapidly changing the north.³³ A section of the treaty

includes a clause recognizing the First Nations' right to hunt, trap, and fish throughout the surrendered land, subject to government regulations and outside of areas taken up for settlement, mining, lumbering, trading, and "other purposes." The main contribution from Ontario was to insert a clause in the treaty which prevents reserves from including sites that have a high potential for hydroelectric development. Historically, these sections of Treaty 9 have been applied in ways that exclude First Nations from economic development in the Ontario north. Ontario Natural Resources Minister David Ramsey recognized this on March 19, 2006, when he met with chiefs of forty-nine First Nation communities in northwestern Ontario to open negotiations on a new deal for Aboriginal people in the region. "For the last 100 years, we've let them down," Mr. Ramsey said. "That's our shame as a society. We really have an opportunity now to correct that."³⁴

3.2.3 *St. Catherine's Milling and Its Legacy*

The *St. Catherine's Milling* case was a crucial turning point in a federal-provincial struggle for control over lands ceded to the Crown by First Nations. The key issue in the case was whether the Crown in the right of Ontario or the Crown in the right of Canada owned the off-reserve lands ceded to the Crown in Treaty 3. The case was heard by three Canadian courts and finally decided by the Judicial Committee of the Privy Council in Great Britain. Ontario won at all levels. The case established that Aboriginal lands ceded to the federal Crown through treaties, and not held as reserves, belong to the provincial Crown.

The legacy of *St. Catherine's Milling* is that it gave the Ontario government a major role in land and resource issues relating to Aboriginal people. This role in Aboriginal relations is unique among the provinces. As the treaty process continued westward from Ontario, the federal government retained ownership of lands ceded to the Crown in Alberta, Manitoba, and Saskatchewan. When it handed these lands over to the provinces in 1930, it inserted a clause in the agreement to protect the Indians' hunting, trapping, and fishing rights on Crown lands.³⁵ Until the 1970s, when negotiation of treaties on unceded Aboriginal lands resumed, no other province had been as directly involved in treaty implementation and negotiations as Ontario had been from 1850 on.

St. Catherine's Milling did not end the struggle between Ontario and Canada for control of natural resources. In one instance in 1886, the federal government sold off timber rights on lands designated as a reserve in the Robinson Lake Superior treaty. The federal government held the money in trust for the First Nation, only to find that, fourteen years earlier, Ontario had sold off the very

same timber rights. The case went to court and was settled in favour of the federal government.³⁶ In section 91(24) of the Canadian Constitution, reserve lands clearly came under exclusive federal jurisdiction over “Indians, and Lands reserved for the Indians.”

But skirmishing between the two levels of government continued. First Nations were not permitted to sell the land or resources of their reserves directly to private interests. So, when gold was discovered on part of the land reserved for the Wauzhushk Onigum First Nation under Treaty 3, the First Nation sold that part of the reserve to the federal government in return for a promise that royalty payments from mining the gold would be held in trust for the First Nation. In *Ontario Mining Company v. Seybold*,³⁷ Ontario successfully challenged this arrangement in the courts. The court held that the Indians had no interests in minerals and that mineral rights belonged to the province.

3.2.4 The Exclusion of Aboriginal Peoples from Economic Development in Ontario

Ontario has developed one of the strongest economies in the world, but its economic development has been, in no small part, at the expense of the First Nations from which it acquired its land and natural resources. Economic policies and priorities in the province have neither protected the traditional Aboriginal economy nor enabled First Nations to participate in the industrial economy built on their traditional lands. From an economic perspective, the land surrender treaties were essentially instruments of dispossession, leaving First Nations with small parcels of relatively unproductive land, and increasingly denying them access to the economic pursuits that had sustained them for centuries.

Historically, there was neither accommodation nor acknowledgement of Aboriginal interests in the regulatory regime the province developed for managing natural resources. This was particularly evident with respect to the regulation of hunting and fishing. There were exemptions in early provincial regulation for Indians to carry on subsistence harvesting.³⁸ But the relegation of the Aboriginal interest to subsistence harvesting (and thus excluding commercial harvesting) was insensitive to the intertwining of subsistence and trading in the traditional Aboriginal economy. Trapping animals, for instance, provided both food for their own consumption and pelts for trading.

As the province developed a more rigorous scheme of wildlife management, Aboriginal interests were systematically subordinated to hunting and fishing for sport and the tourist industry. The process began in the 1890s with the creation of the Ontario Game and Fish Commission and its system of enforcement, which per-

mitted wardens to keep half of the money collected from the fines they levied. Increasingly, Aboriginal people became the targets of this enforcement. In the first two decades of the twentieth century, statutory exemption for Aboriginal harvesting was withdrawn. Even as Ontario was enforcing its fish and game laws with increasing determination, the federal government was proving less inclined to intervene and protect Aboriginal treaty rights. Federal officials eventually ceased to plead with Ontario officials for leniency on behalf of Indians, and disparaged the efforts of lawyers who might be engaged by bands to defend harvesting rights as “endeavouring to mislead the Indians” by encouraging interventions that “can lead to no good result.”³⁹

Aboriginal people continued to petition the Indian Department in Ottawa to protect their hunting, fishing, and trapping rights, but to no avail. The courts were no help. In 1913, the fundamental question of whether the Ontario *Game and Fisheries Act* had to accommodate Indian treaty rights came before the highest court in Ontario. The question arose from a case in which a Hudson Bay Company employee in Robinson Treaty territory was convicted of possession of beaver pelts purchased from Indians during a closed season.⁴⁰ After sitting for more than a year on the matter, Chief Justice Meredith simply announced that the court would not render a decision.⁴¹ In 1930, a similar case adjourned without a hearing or judgment.⁴² In 1939, when an Ontario court finally made a decision on the extent to which provincial wildlife legislation should accommodate Aboriginal treaty rights, the result was entirely negative. The judge ruled that the question of whether the Indians had any treaty rights was irrelevant because such “rights (if any) may be taken away by the Ontario Legislature without any compensation.”⁴³ Far from resisting this overriding of treaty rights, the federal government itself actively prosecuted Indians for harvesting. In a case involving the right of Calvin George to hunt ducks on the Kettle Point Reserve, the Supreme Court of Canada held that the federal *Migratory Birds Convention Act* could prevent Indians from hunting, even on a reserve.⁴⁴

This pattern of excluding any consideration of the treaty rights and economic interests of Aboriginal people was by no means confined to fish and game regulation. It was equally evident in the development of natural resource industries in Ontario. Mining and lumbering were permitted on lands which First Nations had ceded to the Crown, without any concern for the impact of the new industries and their infrastructure on the traditional Aboriginal economy. Provincial regulatory authorities likewise showed no concern for the impact of industrial activities on the physical or spiritual wellbeing of the Aboriginal people who continued to live off the lands and waters on which the development was taking place.

Excluding First Nation interests and ignoring treaty rights continued all through the latter half of the twentieth century. There are many examples, but two disputes that carried on for many years and received considerable public attention involved logging projects on the traditional lands of the Teme-Augama Anishinabai in Temagami, and the Saugeen Ojibwe Nation's commercial fishery in the Great Lakes.⁴⁵ In both cases, agreements were eventually reached which recognize the interests of the First Nations and give them a role in the resource management of their traditional territory. But these agreements were reached only after years of turmoil and conflict. In both cases, the federal government intervened to assist in bringing about a settlement.

3.2.5 The Legacy of Failing to Honour Treaties

The issues that lead to the kind of confrontation that occurred at Ipperwash, and more recently at Caledonia, can be, in most cases, traced to alleged past failures to honour treaties with First Nations. Many of these breaches of treaty obligations occurred a long time ago, when neither governments, both federal and provincial, nor the judiciary took treaties with First Nations seriously as the basis of rights and mutual obligations. It is often difficult for people today who have no knowledge of the importance of treaties in the development of the province to understand how these historical events bear on present-day justice. Yet all of us enjoy the benefits of the treaties through which Aboriginal peoples ceded their traditional lands to the Crown. Justice requires that in accepting the benefits, we also accept the obligations that came with them. The requirements of justice have not changed, but today there is a greater willingness on the part of the non-Aboriginal beneficiaries of treaties, the governments they elect, and the judges who decide cases arising from treaty issues to take our treaty obligations seriously.

Ontario is unique among the provinces with respect to relations with Aboriginal peoples in that it has the largest Aboriginal population in Canada. And unlike other provinces, Ontario has a foundation of treaty relationships with First Nations in which both the federal and provincial governments are deeply involved. Making those treaty relationships work for us all is the key challenge of the future.

3.3 Renewing Treaty Relations and Recognizing Aboriginal Rights

In this section, I highlight recent developments in Aboriginal law and policy. These developments provide the constitutional foundation for putting Aboriginal relations in Ontario on a footing that will minimize the likelihood of more situations like Ipperwash. The policies actually practiced in Ontario by both the

provincial and federal governments must be improved further to meet the principles and standards now recognized in the constitutional law of Canada. My recommendations for reforming Aboriginal policy in Ontario aim to fulfil the promise of the new path we have been taking toward providing full opportunity for Aboriginal peoples to enjoy the benefits of Ontario, while at the same time renewing and benefiting from our treaty relationships.

3.3.1 1969 — *A Turning Point*

To understand the context for Aboriginal relations in Ontario today, it is important to go back to 1969, when a crucial event in relations with Aboriginal peoples in Canada took place. In June of 1969, the federal government issued a White Paper setting out a new “Indian Policy” for Canada.⁴⁶ The crux of the new policy was that Indians were to have “full and equal participation in the cultural, social, economic and political life of Canada,” but they would have to give up any claims to special status or rights as Aboriginal peoples.⁴⁷ Indians (and presumably Métis and Inuit) were to enjoy the full rights of Canadian citizenship. In return, they would give up all their collective historic rights. The paper rejected Aboriginal title as a basis of claiming land ownership and said that a way of ending treaties equitably would have to be found.

When the White Paper was presented to a large and representative group of Aboriginal leaders in Ottawa, they rejected it as a satisfactory basis for restructuring their relationship with Canada. They welcomed the end of discrimination against Indians and other Aboriginal people, but not at the price of giving up recognition of their historic societies, treaty rights, and Aboriginal rights. The federal government subsequently withdrew the paper. In the years that followed, policy and law in Canada moved away from the objective of total assimilation and the elimination of Aboriginal peoples as political societies and toward recognizing the rights of the Aboriginal peoples and honouring treaties.

3.3.2 *First Steps along a New Path*

In 1973, following the decision of the Supreme Court of Canada in the *Calder* case,⁴⁸ the federal government changed its position on the recognition of Aboriginal rights. In the *Calder* case, the Nisga’a Nation sought recognition of its Aboriginal title over its traditional lands in the Nass Valley in northern British Columbia. This was the first time in Canadian history that such a claim by an Indian nation had been adjudicated in the highest court. All six of the Supreme Court justices who dealt with the issue agreed on the existence of native title in Canadian law. In the words of Justice Judson,

the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.⁴⁹

Faced with acknowledgement of native title by the Supreme Court, the federal government could no longer ignore claims made on that basis. The change of position on Aboriginal rights under the Liberal government of Prime Minister Trudeau was a non-partisan decision, supported by both the Conservative and New Democratic parties. A few months later, the federal government issued a statement indicating that it would establish policies and procedures for settling land claims and treaty issues.

The federal government subsequently introduced processes for dealing with two kinds of Aboriginal claims. One was a process for negotiating settlements with the Aboriginal groups still living on the traditional lands who had never made a treaty with the Crown. This was called the Comprehensive Claims process.⁵⁰ In effect, it renewed the treaty process followed in Canada up to the 1920s. The second, the Specific Claims process,⁵¹ aimed at settling outstanding legal obligations of the Crown, arising out of the failure to fulfill the terms of past treaties, breaches of obligations arising under the *Indian Act*, the administration of funds or other assets, and the illegal disposition of Indian lands. Since nearly all of Ontario is subject to historic treaties, the Specific Claims process has been most germane to Ontario.

During the same period, Ontario also began to move along the path of recognizing treaty and Aboriginal rights and setting up procedures for dealing with them. In 1976, it established a general process for addressing First Nation claims for the first time, which took the form of an Office of Indian Claims within the Ministry of Natural Resources. Although lacking any policy to guide it, this office began to review a few First Nation claims.⁵²

In 1977, the Government of Ontario established a Royal Commission, chaired by Justice E.P. Hartt, to inquire into the impact of resource exploitation on the people and environment of Northern Ontario. The tragic effect of mercury poisoning on two First Nations, resulting from the forestry operations of Reed Ltd., was a key focus of Justice Hartt's inquiry. Justice Hartt noted that two-thirds of the people living in the northern half of Ontario were Aboriginal people who depended on the land for their survival. Moreover, he concluded that

[a] major focus of Indian demands involves the use of Crown land, specific land claims and accessibility to resources, all of which are related to the interpretation of the original treaties. To date, Government

seems to have left these matters to be resolved by the courts. I do not believe that this is the most productive course of action to follow.⁵³

To oversee and manage the settlement of claims, Justice Hartt recommended establishing a tripartite commission, composed of representatives of the federal and provincial governments and Ontario First Nations.⁵⁴

This recommendation led to the creation of the Indian Commission of Ontario (ICO) in 1978. The mandate of the Commission was based on a resolution of the Chiefs of Ontario and parallel orders-in-council of the governments of Canada and Ontario.⁵⁵ The mandate gave the ICO three functions: to be a forum for negotiating self-government issues, to examine and resolve any other issues of mutual concern, and to inform Ontario residents of the matters being dealt with. In effect, the ICO became the main forum for settling land claims in Ontario. Most of the land claim negotiations facilitated by the ICO involved the federal government (under its Specific Claims policy), the provincial government, and one or more First Nations.⁵⁶

As first steps toward renewing treaty relationships and dealing effectively with Aboriginal rights and treaty-based claims, the policies and processes introduced by the federal and Ontario governments left much to be desired. The Specific Claims process and its application in Ontario have proven to be extraordinarily slow and ineffective. Control of the process by the federal and provincial governments and the absence of any capacity for independent decision-making make the process illegitimate in the eyes of many Aboriginal peoples. First Nations and Aboriginal organizations have made their criticisms known, often by refusing to participate in these proceedings.⁵⁷ Published reports have also highlighted the inadequacies and failures of these policies and have called for major reforms.⁵⁸ Yet, with only slight modifications, the policies and practices instituted thirty years ago are still in place. Failure to reform the land claims process in Ontario means increasingly that the only alternatives for First Nations faced with longstanding disputes about treaty and Aboriginal rights are expensive and time-consuming litigation in the courts or direct action.

3.3.3 Recognizing Aboriginal and Treaty Rights in the Constitution

During the 1970s, Aboriginal peoples and their leaders saw the major efforts in the field of constitutional reform as an opportunity to secure explicit recognition of their status and rights in the Constitution of Canada.⁵⁹ Through the efforts of Canada-wide organizations representing Indians, Inuit, and Métis, a clause was inserted in the *Constitution Act, 1982*, which entrenched Aboriginal and treaty rights in the Constitution. This clause is section 35:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

Another provision of the *Constitution Act, 1982* is section 25 of the *Canadian Charter of Rights and Freedoms*, which states that the rights and freedoms guaranteed in the Charter

shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Recognition of Aboriginal and treaty rights in the Constitution was a major step towards establishing just and mutually beneficial relations with Aboriginal peoples. But the terms set down in the Constitution were very general, leaving much to be done to add substance to these constitutional provisions and to apply them to the ongoing relationships with Aboriginal peoples. Generally speaking, there are two ways to do this: through political negotiations and agreements, or through litigation. Regrettably, to date, little has been achieved through political agreements. This is true as regards both Canada and Ontario.

3.3.4 Failure to Make Progress through Negotiated Political Agreements

Since 1982, there have been numerous efforts, at both the national and provincial level, to better define and secure Aboriginal and treaty rights. But most of these have failed to produce significant and sustained progress in improving relations with Aboriginal peoples.

On the constitutional front, federal and provincial ministers held four conferences with Aboriginal leaders between 1983 and 1987, but failed to reach agreement on a way of incorporating in the Constitution of Canada the inherent right of Aboriginal people to govern their own societies.⁶⁰ Aboriginal peoples were left out of the constitutional negotiations which immediately followed and which produced the Meech Lake Accord. Excluding the concerns of Aboriginal peoples from the Meech Lake Accord turned out to be a crucial factor in its failure

to be adopted. This mistake was not repeated in negotiating the Charlottetown Accord, the focus of the last major effort at reforming the Constitution. The Charlottetown Accord, agreed to by the federal government and all provincial governments, dealt with the rights of Aboriginal peoples and included a large section recognizing the inherent right of Aboriginal peoples to self-government within Canada. It also included a commitment by the federal and provincial governments to a process of treaty implementation and rectification. Although the Charlottetown Accord failed to be adopted in the referendum of October 26, 1992, observers and analysts do not attribute that result to the proposals dealing with Aboriginal peoples.

There have also been less formal political efforts to renew treaty relations and to respect Aboriginal rights. But again, for the most part, these efforts have failed to produce results and have added to what Aboriginal peoples see as a history of unfulfilled promises.

In Ontario, one such effort was the Statement of Political Relationships, agreed to by the then-provincial government and First Nation leaders in 1991. The Statement begins by recognizing the inherent right of First Nations to self-government, which flows from the Creator and from the First Nations' original occupation of the land. It then records the commitment of First Nations and Ontario to implement that right "by respecting treaty relationships, and by using such means as the treaty-making process, constitutional and legislative reforms and agreements acceptable to the First Nations and Ontario."⁶¹ At the time, the Statement seemed to herald a new era in Aboriginal relations in Ontario and a political commitment by the Ontario government to enter into further negotiations. But the Statement was not legally binding, and very soon, it would appear that it was not binding in a political sense either. The then-provincial government did follow it up with some Ontario/Aboriginal Round Table talks, and it established a task force within its Native Affairs Secretariat to work on self-government and land claims. But no structures with real political strength and visibility were put in place to implement the Statement.⁶² The new provincial government elected in 1995 subsequently repudiated the Statement.

A lesson to be learned from this episode is that real change in Aboriginal relations in Ontario requires more than a statement of political intent supported by one government. Structures and legislation must be established which provide a solid and enduring foundation for implementing the commitments made.

Another example of an effort at a new relationship whose promise remains largely unfulfilled, this time at the national level, is the Royal Commission on Aboriginal Peoples (RCAP). RCAP was established in response to the crisis at Oka, Quebec, when Canadian soldiers and Mohawk warriors confronted each

other across the barricades throughout the summer of 1990. It was undoubtedly a crucial event in galvanizing Aboriginal peoples in Canada to move to protect their rights and interests. After the Oka crisis, the government under Prime Minister Mulroney established RCAP with a broad mandate to look into virtually all aspects of Aboriginal relations. The six-volume report of the Commission, tabled in 1995, put forward a broad program of reform, including dismantling the *Indian Act* and renewing treaty relations. One of the recommended reforms, which is most pertinent to my mandate, envisaged a fairer and more effective way of dealing with specific land claims.⁶³

The official response to RCAP by the federal government was presented in *Gathering Strength: Canada's Aboriginal Action Plan*, which accepted the general idea of building a new relationship with Aboriginal peoples based on self-government and within a treaty framework, but contained few specific measures.⁶⁴ With respect to the specific claims proposal, it simply said that "[t]he Government of Canada has been working with First Nations to make recommendations for an independent claims body to render binding decisions on the acceptance or rejection of claims." This undertaking seemed to be close to being fulfilled in 1998, when a Joint Task Force of the federal and provincial governments and First Nations representatives reached agreement on proposals for a permanent independent body to resolve impasses in land claims negotiations.⁶⁵ But the *Specific Claims Resolution Act* enacted by parliament in 2003 to establish a new claims tribunal met with strong opposition from Aboriginal people for its failure to meet key requirements of an acceptable specific claims process, including the objection that the new tribunal lacked independence.⁶⁶ The legislation has remained unproclaimed while efforts continue to amend the *Act* to meet those objections.

A final example of a promising reform in Aboriginal relations initiated by a government that later backed away from it involved efforts to improve the land claims process in Ontario.

In 1990, again in the aftermath of Oka, a tripartite council of federal and provincial ministers and Ontario First Nation leaders met to consider improvements in handling specific claims in Ontario.⁶⁷ Although not all of the recommendations of the council were adopted (including, notably, its proposal for an independent body to review federal government decisions on claims), the tripartite council did lead to improvements in the specific claims process in Ontario and the operations of the ICO. Through the ICO, the federal and provincial governments and First Nations were able to resolve immediately the situation of six northern First Nations, still on traditional lands and without reserves or essential services. For the first time, the federal government agreed to deal with pre-Confederation claims, so important in Ontario which is the cradle of land cession treaties in

pre-Confederation Canada. Moreover, the ICO encouraged parties to agree to a common historical fact-finding process, thus avoiding expensive and time-consuming “wars of experts.”

By the first half of the 1990s, the annual budget for the ICO had increased from the original \$545,000 to \$1,160,000, enough to support three full-time facilitators and a support person to deal with land claims. This was still far from enough to prevent growth in the backlog of unsettled claims, but at least the ICO process seemed to be heading in the right direction. But in 1996, the provincial government reduced its contribution to the ICO by twenty-five percent. Then, in 1999, even though a steering committee involving all parties recommended renewing the mandate of the ICO for another five years, the federal Minister of Indian Affairs declined to renew the order-in-council. On March 31, 2000 the ICO closed its doors.⁶⁸

Although the ICO was closed down in 2000, that has not meant that the entire process of settling land claims in Ontario has ground to a halt. Under the aegis of the Native Affairs Secretariat (now the Ontario Secretariat for Aboriginal Affairs), there have been efforts to reduce delay and expedite the process of reaching settlement. Bilateral and trilateral discussions directed at improving and restructuring the process have taken place between First Nations and the provincial and/or federal government. And there have been a number of successful negotiations between the province and Ontario First Nations with respect to land and treaty claims and resource development. But, while this is all for the good, much more is needed to provide the solid and enduring foundation for a genuine renewal of treaty relationships in Ontario.

3.3.5 Judicial Decisions on Aboriginal and Treaty Rights

Lack of progress in clarifying and applying Aboriginal and treaty rights at the political level has meant that the courts have been increasingly called upon to settle disputes about these rights. In doing so, they have developed a significant body of case law on constitutionally protected Aboriginal and treaty rights. The principles in some of the key cases provide the framework of constitutional law on which I have based my assessment of the treatment of Aboriginal and treaty rights in Ontario and my recommendations for reforms to reduce the likelihood of confrontations like Ipperwash.

3.3.5.1 Fiduciary Obligations

I have referred to the fiduciary obligation that rests with the Crown as a consequence of its monopoly on purchasing Indian lands. In 1984, *Guerin v. The*

*Queen*⁶⁹ reaffirmed that when the Crown is involved in the sale or lease of Indian lands, it has an obligation to act in the best interest of the Indians. “As would be the case with a trust,” Justice Dickson (as he then was) wrote, “the Crown must hold surrendered land for the use and benefit of the surrendering band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach.” Many of the land claims which remain unsettled in the province involve allegations of breaches of the fiduciary obligation of the Crown.

3.3.5.2 *Interpreting Treaties*

Beginning with the *Simon* case in 1985, the Supreme Court has set rules for interpreting treaties with First Nations.⁷⁰ These rules are directed at respecting treaties and treating First Nations people in a just and honourable way. In 1999, in *R. v Marshall*,⁷¹ Justice McLachlin (as she then was) summarized the principles governing the interpretation of treaties as developed by the Supreme Court in numerous cases:

- Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
- The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one that best reconciles the interests of both parties at the time the treaty was resolved.
- In searching for the common intention of parties, the integrity and honour of the Crown is presumed.
- In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
- The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
- A technical or contractual interpretation of treaty wording should be avoided.
- While construing the language generously, courts cannot alter the terms by exceeding what “is possible on the language” or realistic.

- Treaty rights of aboriginal peoples must not be interpreted in a static way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are incidental to the core treaty right in its modern context.⁷²

Justice McLachlin enunciated these principles to guide judges who are called upon to decide disputes about treaties, but these principles also apply to the process of negotiation. Preferably, disputes about treaties should be settled, to the extent possible, through negotiation rather than the very long and expensive process of litigation, and it is essential that governments—federal, provincial, and First Nation—observe these principles in their efforts to negotiate the resolution of treaty disputes.

3.3.5.3 *Aboriginal Rights*

In the 1990 *Sparrow* case,⁷³ the Supreme Court rendered its first decision on the meaning of the “existing Aboriginal rights” which are recognized and affirmed in section 35 of the *Constitution Act, 1982*. The Court made it clear that the insertion of the word “existing” did not mean that this section covered only the rights which Aboriginal people effectively enjoyed in 1982. Constitutionally protected Aboriginal rights extend to activities that have been “an integral part” of an Aboriginal people’s distinctive culture. Given the need to affirm and recognize s. 35 rights, the Court held, in a unanimous opinion written by Chief Justice Dickson, “that a generous, liberal interpretation of the words in the constitutional provision is demanded.”⁷⁴ The Court acknowledged that, like all constitutionally protected rights, Aboriginal rights are not absolutes; on occasion, they might have to give way to other important constitutional principles and values.

Since its decision in *Sparrow*, the Supreme Court has dealt with a number of contested claims of Aboriginal rights, upholding some but rejecting others. The key to identifying an Aboriginal right is whether it is a practice or tradition that, in the view of the Court, constitutes an essential element of the distinctive society of an Aboriginal people prior to European contact.⁷⁵ In the 1997 *Delgamuukw* case, which involved claims of the Gitskan and Wet’suwet’en people to traditional lands which they had not surrendered to the Crown, the Supreme Court recognized native title as an Aboriginal right that stems from the fact that Aboriginal peoples possessed the land before the Crown asserted its sovereignty. Aboriginal title goes beyond the Aboriginal rights to engage in specific activities, in that it includes the right to develop traditional lands in non-traditional ways. This includes the exploitation of mineral resources, provided that such

development does not undermine “the nature of the claimants’ attachments to these lands.” Here again, the Court acknowledged that federal and provincial governments may encroach upon lands subject to native title for “compelling and substantial” legislative objectives, but only after endeavouring, through consultation, to accommodate Aboriginal interests, and, in the case of very serious encroachments, only with the consent of the First Nation.

3.3.5.4 *Métis Rights*

In 2001, for the first time, the Ontario Court of Appeal, in *R. v. Powley*,⁷⁶ fully treated the constitutionally recognized Aboriginal rights of Métis peoples in Canada. Without attempting a comprehensive definition of Métis peoples, the court recognized that these were communities of mixed Aboriginal/European heritage with distinct cultures and traditions. Their rights were based on activities integral to the survival and identity of communities they formed after contact with Europeans and before European authorities asserted effective control. In *Powley*, the court upheld the right of the Métis community in the Sault Ste. Marie area to hunt for moose. The Court did not accept that Ontario hunting regulations were justified in not recognizing the Métis right. The Supreme Court of Canada upheld the decision.⁷⁷ Thus, *Powley* is an important precedent in establishing the constitutional obligation of provincial regulatory authorities to accommodate the interests of Métis communities.

3.3.5.5 *The Honour of the Crown and the Duty to Consult and Accommodate*

In 2004, the Supreme Court of Canada decided two cases arising in British Columbia, *Haida Nation*⁷⁸ and *Taku River*,⁷⁹ which involved challenges to provincial government authorization of resource projects which threatened the sustainability of First Nations on traditional lands. In *Haida Nation*, the province was transferring to a forestry company a tree farm license related to lands to which the Haida Nation claimed native title. In *Taku River*, the province planned to build a road to reopen an old mine on land to which the Taku River Tlingit First Nation claimed native title. In both cases, the Court held that the province had a duty to consult with the First Nations with a view to trying to accommodate their interests in the land, and to do so in such a way that while negotiations about their land rights were in process, the spiritual and material value of the land for the Aboriginal peoples was not significantly reduced. The Court made it clear that this duty to consult did not amount to a veto power for First Nations. Rather, it was an obligation on the provincial government to make a good faith effort to ensure that developments on traditional lands accommodated First Nation inter-

ests in those lands. The Court saw this duty as arising from the principle of the “honour of the Crown,” meaning the commitment of the Crown, going back to the 1763 *Royal Proclamation*, to refrain from sharp dealing in relations with Aboriginal peoples and to act in an honourable way.

The following year, in *Mikisew Cree First Nation*,⁸⁰ the Supreme Court applied the duty to consult and accommodate in a situation involving First Nation interests in off-reserve treaty lands. In this case, the federal government approved plans to build a winter road through Wood Buffalo National Park in northern Alberta, on lands surrendered to the Crown under Treaty 8. Treaty 8 included a clause similar to clauses in Ontario treaties which recognize the right of Indians to continue their traditional harvesting throughout the tract of land surrendered, except on such tracts that might be taken up for government purposes. The federal government argued that it had no duty to consult with the First Nation signatories of the treaty in the case of surrendered land. The Supreme Court rejected that argument, and held that the principle of the honour of the Crown meant that “[t]he Crown was required to solicit and listen carefully to the Mikisew concerns and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.”⁸¹ In Ontario, where most of the lands are “surrendered” treaty lands, this decision has a very important bearing.

A common theme in all of these judicial decisions is that it is in everyone’s interest that relations with First Nations and other Aboriginal peoples be conducted in a non-adversarial way. A further and related theme is the view expressed in virtually all of these cases that, to the extent possible, matters at issue between Aboriginal peoples and the provincial and federal governments should be dealt with through discussion and negotiated agreements rather than litigated in the courts. I concur with that view, and in the following chapters, I put forward recommendations to facilitate non-adversarial, negotiated agreements.

Endnotes

- 1 For accounts of these treaties, see Robert J. Surtees, "Land Cessions, 1763-1830," in Edward S. Rogers and Donald B. Smith, *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994), pp. 93-121.
- 2 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 1: Looking Forward, Looking Back* (Ottawa: Supply and Services Canada, 1996). See generally Part Two for a detailed history of Aboriginal policy in the land now called Canada.
- 3 R.S., 1985, c. I-5.
- 4 RSC 1927, ch. 98, s. 149A. In 1927, the *Indian Act* had been amended to make it an offence, subject to a fine or imprisonment of up to two months, for anyone to solicit funds for Indian legal claims without obtaining a licence from the superintendent of Indian affairs.
- 5 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
- 6 Justice Gordon Killeen, from the judgment at trial in *Chippewas of Kettle and Stony Point v. Attorney General of Canada et al.* (1995) 24 O.R. (3rd) 654, at 690.
- 7 *Chippewas of Kettle and Stony Point v. Attorney General of Canada et al.* (1996) 31 O.R. 3(rd) 97. This decision was upheld by the Supreme Court of Canada, *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1998] 1 S.C.R. 756.
- 8 Darlene Johnston, "Respecting and Protecting the Sacred" (Inquiry research paper).
- 9 Johnston, p. 17.
- 10 Chapter W-2 [Repealed, R.S., 1985, c. 22 (4th Supp.), s. 80].
- 11 Noelle Spotton, "A Profile of Aboriginal Peoples in Ontario" (Inquiry research paper). Ms. Spotton served as a policy counsel with the Inquiry. This section draws on her paper.
- 12 Spotton, p. 9. The 2001 Census reports an "Aboriginal origin" population of 308,105 in Ontario. "Aboriginal origin" refers to persons who reported at least one Aboriginal origin in response to the ethnic origin question (North American Indian, Métis, or Inuit). In this report, I have chosen to use the "Aboriginal identity" data because it refers to people who self-identify as Aboriginal. The 188,315 figure does not include the 14,335 Aboriginal people who, Statistics Canada estimates, were not counted as a result of problems in collecting census data for Aboriginal people.
- 13 Chiefs of Ontario Part 2 submission, para. 1.
- 14 Indian and Northern Affairs Canada. "Registered Indian Population by Sex and Residence, 2004," <http://www.ainc-inac.gc.ca/pr/sts/rip/rip04_e.html>.
- 15 Eric Guimond, "Fuzzy Definitions and Population Explosion: Changing Identities of Aboriginal Groups in Canada," in David Newhouse and Evelyn Peters, eds., *Not Strangers in These Parts: Urban Aboriginal Peoples* (Ottawa: Policy Research Initiatives, 2003).
- 16 Spotton, p. 17, from Statistics Canada 2001 Census, "Aboriginal Identity Population, Median Age for Canada, Provinces and Territories — 20% Sample Data."
- 17 Michael Coyle, "Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future" (Inquiry research paper).
- 18 Surtees, p. 107.
- 19 Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991).
- 20 Sidney L. Haring, *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence* (Toronto: Osgoode Society, 1998), pp. 41-2. The Iroquois Confederacy included the Mohawk, Onondaga, Onoyota'a:ka, Cayuga, Tuscarora, and Seneca nations.

- 21 Coyle, p. 31.
- 22 Ibid., p. 12.
- 23 Ibid., p. 15.
- 24 This was the policy adopted by Lieutenant-Governor, Sir Francis Bond Head, in 1835.
- 25 Canada. Department of Indian and Northern Affairs. Treaty Research Report, Robert J. Surtees, “The Robinson Treaties” (Ottawa: Department of Indian and Northern Affairs, 1986). See also Janet Chute, *Shingwaukonse: A Century of Native Leadership* (Toronto: University of Toronto Press, 1998).
- 26 Alexander Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles Publishing, 1971), pp. 304-9.
- 27 Norman K. Zlotkin, “Post-Confederation Treaties,” in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Toronto: Carleton University Press, 1985), p. 273.
- 28 *A.G. Canada v. A.G. Ontario*, [1897] A.C. 199, 66 LPJC 11 (JCPC).
- 29 *Simon v. The Queen* [1985] 2 S.C.R. 387, at 399.
- 30 *St. Catherine’s Milling & Lumber Co. v. The Queen* (1888), 14 App.Cas. 46 (JCPC).
- 31 Coyle, p. 12.
- 32 1891, 54-55 Vic. c. 5.
- 33 Patrick Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario,” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), ch. 4.
- 34 Kate Harries, “Resources Minister set to negotiate new deal for native bands,” *Globe & Mail*, March 20, 2006.
- 35 *Constitution Act, 1930*. There was also an agreement with British Columbia. It does not include this clause, but there is a clause with respect to Indians in the Terms of Union with British Columbia.
- 36 *Attorney General of Ontario v. Francis* (1887) 2 C.N.L.C 6 (unreported until 1980).
- 37 *Ontario Mining Company v. Seybold* (1899) 31 O.R. 386.
- 38 For a detailed account, see Jean Teillet, “The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario” (Inquiry research paper), pp. 25-36.
- 39 Teillet, p. 35.
- 40 *Rex v. Train*, (1912), unreported.
- 41 Ibid., at 31.
- 42 *Rex v. Padjena and Quesawa*, 4 C.N.L.C. (1930) at 411-414.
- 43 *Rex v. Commanda*, (1939) C.N.L.C., Vol. 5, 367.
- 44 *R. v. George* (1966) C.N.L.C., Vol. 6, 360 (S.C.C.).
- 45 Teillet, pp. 46-51 and 53-8. See generally Jean Teillet’s account of both cases.
- 46 Canada. Department of Indian Affairs and Northern Development, *Statement of the Government of Canada, Statement of the Government of Canada on Indian Policy 1969* (Ottawa: Queen’s Printer, 1969).
- 47 For a discussion of the 1969 White Paper, see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).
- 48 *Calder v. A.G. British Columbia* [1973] SCR 313.

- 49 Ibid., at 328.
- 50 The Comprehensive Claims Process was outlined in a booklet entitled, *In All Fairness: A Native Claims Policy — Comprehensive Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1981; amended 1986).
- 51 The Specific Claims Process was outlined in a booklet entitled, *Outstanding Business: A Native Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1982).
- 52 Coyle, p. 43.
- 53 Ontario. Royal Commission on the Northern Environment. E.P. Hartt, Commissioner, *Report of the Royal Commission on the Northern Environment: Interim Report* (Toronto: Royal Commission, 1978), p. 34.
- 54 Ibid., p. 36.
- 55 Coyle, Appendix 3 (copies of the orders-in-council).
- 56 Ibid., p. 45.
- 57 Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin Books, 1994).
- 58 (i) Canada. Department of Indian Affairs and Northern Development. Gerald V. LaForest, *Report on Administering Processes for the Resolution of Specific Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1978); (ii) Canada. Department of Indian Affairs and Northern Development. *Living Treaties: Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985); (iii) Canadian Bar Association, Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988); (iv) Ontario. Indian Claims Commission of Ontario, "Discussion Paper Regarding First Nation Land Claims: Report of Activities" (Toronto: Indian Commission of Ontario, 1990); (v) Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), pp. 527-56 [RCAP report, vol. 2].
- 59 Douglas Sanders, "The Indian Lobby," in Keith Banting and Richard Simeon, *And No One Cheered: Federalism, Democracy & The Constitution Act* (Toronto: Methuen, 1983), pp. 301-32. See also Teillet, pp. 37-8.
- 60 David Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989).
- 61 David Cameron and Jill Wherrett, "New Relationships, New Challenges: Aboriginal Peoples and the Province of Ontario," Royal Commission on Aboriginal Peoples project on Canadian Governments and Aboriginal Peoples (Ottawa: Supply and Services Canada, November 1993), pp. 33-4. The authors note that exceptions were the Chippewas of Nawash, Saugeen, and Cockburn Island First Nations.
- 62 Ibid., pp. 34-8.
- 63 RCAP report, vol. 2, pp. 545-613.
- 64 Canada. Indian and Northern Affairs Canada. *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: 1997).
- 65 Coyle, p. 39.
- 66 S.C. 2003, c. 23.
- 67 Coyle, p. 45.
- 68 Ibid., p. 46.

69 *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

70 *Simon v. The Queen* [1985] 2 S.C.R. 387.

71 *R. v. Marshall* (1999) 3 S.C.R. 456.

72 *Ibid.* Note that case citations for each of the principles have been omitted.

73 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

74 *Ibid.*, at 228.

75 See, for instance, *R. v. Van der Peet* [1996] 2 S.C.R. 507.

76 *R. v. Powley* (2001) 196 DLR (4th) 221.

77 *R. v. Powley*, [2003] 2 S.C.R. 207.

78 *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.

79 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550.

80 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

81 *Ibid.*, at 64.

SETTLING LAND CLAIMS

The evidence heard in the hearings, the policy papers submitted by the parties, the research carried out by the Commission, and the community consultations and round-tables discussions I attended make clear to me that the single biggest source of frustration, distrust, and ill-feeling among Aboriginal people in Ontario is our failure to deal in a just and expeditious way with breaches of treaty and other legal obligations to First Nations. If the governments of Ontario and Canada want to avoid future confrontations like Ipperwash or Caledonia, they will have to deal with land and treaty claims effectively and fairly.

The term “land claims” is the source of considerable public misunderstanding. It tends to suggest that First Nations are asking governments to give them more land, but the opposite is the case: these claims ask governments to fulfill the promises they made to First Nations about land and resources in the past and to compensate them for their failure to do so. The paper prepared for the Inquiry by the Ontario Secretariat for Aboriginal Affairs (OSAA, formerly known as the Ontario Native Affairs Secretariat (ONAS)) puts it succinctly: “Land claims assert a failure on the part of the Crown to live up to the promises made to Aboriginal people and the duties in law owing to them.”¹

Settling these claims is not only essential for establishing respectful and harmonious relations with First Nations, but also for ensuring that the rule of law is maintained in Aboriginal relations.

Because legal issues are at the heart of these claims, First Nations could litigate them in the courts. But formal litigation is expensive and adversarial. Moreover, the courts are usually not capable of fully settling the dispute. Court decisions tend to be winner-take-all verdicts on specific legal questions. Often, judges call upon the parties to continue negotiating matters that are beyond the jurisdiction of the court. Perhaps most importantly, judicial decisions cannot establish the positive ongoing relationship between First Nations, governments, and neighbouring communities that is needed for working out consensual approaches to practical matters that go beyond purely legal issues. It is for these reasons that alternatives to litigation were introduced which aim at reaching negotiated settlements.

Unfortunately, the land and treaty claims processes developed and applied by the federal and provincial governments since the mid-1970s have been largely ineffective, painfully slow, and unfair.

The ineffectiveness of these processes shows in the fact that only eleven of the 116 claims received by the Ontario government between 1973 and 2004 have been settled. This means only 9% of claims filed in Ontario have been settled in the last thirty years.² That is not an enviable track record.

The average time between filing a claim and reaching final settlement was fifteen years.³ Implementing the settlement often adds years to this total. Justice delayed is surely justice denied.

Finally, these processes are unfair. The government that receives a First Nation's claim determines whether it has legal validity, and there is no mechanism within the process for obtaining an independent review of the decision. A dispute-settling process in which one of the parties to it is the judge fails to meet the standard of justice that any fair-minded person would require. Every independent review of the current claims process in Ontario has identified as one of its major flaws the conflict of interest inherent in allowing the government to determine all legal issues.⁴

These are the most obvious and long-standing difficulties with the land and treaty claims process in Ontario. Experience has shown, however, that these processes would also benefit from improved accountability and transparency and better public education.

It is clear that the processes, institutions, and resources dedicated to resolving land and treaty claims in Ontario must be improved. The consequences of failing to address these issues constructively are predictable: more Aboriginal occupations and protests, more judicial intervention in the land and treaty claims process, slowed or stalled economic development, and more confrontations between the Aboriginal and non-Aboriginal communities.

Fixing the flaws in the claims settlement process is complicated by the federal/provincial nature of the problem. A few claims in Ontario may involve only the federal government, but most claims involve both levels of government. This means that any reforms introduced by Ontario will be incomplete and inadequate unless appropriate complementary reforms take place at the federal level. As commissioner of a provincial inquiry, my recommendations focus on what Ontario must do to overcome the shortcomings of the existing process, but I take into account the present state of the federal Specific Claims process and the reforms to that process which the federal government and parliament are now considering. The federal initiatives give the provincial government in Ontario an important opportunity to achieve compatible and effective reform of the claim settlement process in Ontario. Of course, the essential third partner in establishing an effective and legitimate process for resolving disputes concerning treaties with First Nations is the First Nations themselves and the organizations representing their

interests. Land claims processes are unlikely to work or to be credible if the dispute settlement process is imposed upon First Nations. I believe that reforms must be acceptable to First Nations as well as to the federal and provincial governments.

In order to play their part in reforming the claims process in Ontario, treaty nations have an obligation to build support for the effort in their own communities and with each other. How they do this is very much the responsibility of the people and leaders of the treaty nations and the organizations they have built to advance their common interests. I recognize the challenge of overcoming skepticism born of many years of frustration and unfulfilled promises, and the challenge of finding common ground within the diversity of experience and tradition among the First Nations in this province. I hope that the promise of a new beginning arising out of the work of this Inquiry will provide the incentive for First Nations and their leaders to take up this challenge effectively.

4.1 What Are Land Claims About?

According to the federal government, 273 claims had been filed in Ontario against the federal government as of September 30, 2006.⁵ Under federal policy, these are classified as specific claims. Most of these claims arise from alleged failures by the Crown to deal properly with lands reserved for First Nations by treaties.⁶

Twenty-eight of these claims against Canada in Ontario, over 10%, relate to the Six Nations of the Grand River, the most populous reserve in Canada. The protest which continues at Caledonia involves one of these claims. In addition to claims arising from historic treaties, there are a few claims alleging that certain lands were never “surrendered” by treaty, and that the First Nation therefore still has Aboriginal title to the lands.⁷

Ontario began receiving claims in 1973. The province received 116 land claims between 1973 and April 2005. Most of these claims concern mismanagement or mistreatment of reserve lands.⁸ Most of these claims also involve claims against the federal government. For instance, an allegation that the federal government has breached its fiduciary obligation to protect reserve lands may be accompanied by a claim against the province for unjustly benefiting from obtaining resources to which it was not entitled. It is often very difficult for First Nations to ascertain the appropriate level of government against which to file their claim. As a result, one of the reforms I suggest is that Canada and Ontario maintain a common registry for claims.

First Nations and Métis communities also have claims about harvesting rights on traditional lands. I discuss natural resource issues in chapter 5.

4.2 Successful Land Claims Settlements

The provincial government, through ONAS (as OSAA was then called), made a detailed submission to the Inquiry regarding Ontario's land claims process in April 2005.⁹ As of that date, OSAA reported that Ontario was party to eleven land claim settlements in which Ontario had turned over 175,000 acres and paid almost \$30,000,000 in financial compensation to First Nations. Ontario was also party to three agreements in principle which, if ratified by the parties, would increase the amount of land transferred to First Nations to about 275,000 acres and financial compensation payable by Ontario to approximately \$85,000,000. Ontario was also participating in nine additional land claim negotiations which, if successfully concluded, would add to those totals substantially.¹⁰

OSAA also advised the Inquiry that the provincial government was implementing three of the eleven settled claims. This last point raises an important issue: Even when an agreement is reached and a settlement is ratified, the settlement is not complete until it is fully implemented. The time it takes to implement a settlement must be added to the average fifteen-year period between filing a claim and negotiating a final settlement. This is obviously an unreasonable length of time for achieving a complete settlement of a land claim.

The most striking facts about the land claims process are the small number of settlements and the length of time taken to complete them. Nevertheless, for two reasons, it is important to recognize what has been accomplished through the process to date.

First, it is important to realize that claims can and do get settled. It would be incorrect to suggest that claims are so numerous or so substantial that it is impossible to settle them. Indeed, experience has shown that parties are able to negotiate creative, just, and effective settlements under the right conditions and with appropriate support.

Second, the land claims settled to date help us to appreciate the size of the remaining claims. This is important in helping us to understand the magnitude of what First Nations may be denied and the potential liability of governments. Professor Coyle obtained information from the *Public Accounts of Canada* to the effect that in 2001, Canada's contingent liability for specific claims across the country was estimated at more than \$2.6 billion.¹¹ The backlog of unsettled claims has grown since that estimate was made, and the figure would probably be greater today. I am not aware of any comparable estimate of contingent liability for Ontario, but it would be significant.

4.3 The Current Process

No reasonable person looking at land claims settlement in Ontario could avoid the conclusion that the process takes far too long. An average of fifteen years to settle a claim would be scandalous in any other part of the Canadian justice system.

In part, OSAA explained the delays in settling land claims as follows:

Ontario's experience is that, with rare exceptions, claims negotiations take years to reach fruition not because of impasses at the negotiating table, or because one of the parties is dragging its feet, but because successful claims negotiations, with their complex mix of legal obligation, long standing grievance, emotion, and once-and-for-all nature are very time-consuming undertakings.

The OSAA paper also points out that the provincial (or federal) government is not always the source of delay. Sometimes, First Nations have difficulty consolidating their positions and identifying the potential beneficiaries of a claim.¹³

Finally, the OSAA paper stresses there have been "very significant improvements in the negotiation process that become evident by looking at milestones achieved longitudinally."¹⁴ In other words, the process is getting faster.

I recognize that the legal and historical matters at issue in a claim are extremely complex. Land claims are complicated legal agreements that involve multiparty negotiation of complicated historical, property, legal, financial, and implementation issues. Land claims negotiations typically include negotiations over the basis of the claim, the valuation of loss, the nature and scope of compensation, the apportionment of federal and provincial contributions to the settlement, and questions about third-party interests. I also recognize that it is simplistic to blame the federal and provincial governments for every delay or frustration in the land claims process.

However, I believe that it is possible to improve the effectiveness and efficiency of the claims process significantly. According to Professor Coyle, "Presumably, the major reason for the length of time taken by Ontario to review claims is that insufficient resources are available to complete the task earlier."¹⁵ Anyone familiar with the process will agree that Professor Coyle's comment is quite reasonable. Yet more than increased resources are needed. I propose procedural and institutional reforms to expedite the process of reviewing claims and to make it more fair and accountable.

The Ontario claims process proceeds in distinct steps.¹⁶ First, there is a two-step process before negotiations begin. The first step in this pre-negotiation phase

occurs immediately after Ontario receives a statement of claim from an Aboriginal group. OSAA performs two tasks at this stage. It gives the claimant group information about the process, including how funding can be obtained, and it examines the statement of claim and accompanying documentation to ensure their “clarity and completeness.” Clearly, the process of receiving the submission and informing the claimant group about the claims is necessary. We were given no information on how much time it typically takes to complete this first step, but I did not hear that this step was a major source of delay.

The second step in the pre-negotiation phase is the crucial stage at which the provincial government decides whether it will accept the claim for negotiation. This is the complex, time-consuming, process to determine if the claim is even eligible for negotiations.

There are three parts of this stage of the process: historical review, legal review, and the Minister’s decision to accept or reject the claim for negotiation. OSAA supplied the following table which sets out the steps and milestones in the process.

Land Claims Milestones Achieved by Period (April 2005)¹⁷

Period	Active Claims	Historical Review	Legal Review	Minister’s Decision	Not Accepted	Agreement	
						In Principle	Final Agreement
’73-’85	26	13	7	2		—	—
’86-’95	45	15	14	19		6	6
’96-’04	86	39	36	26	2	9	5

OSAA subsequently updated some these figures for the Inquiry. As of January 2007, OSAA reported that fifty-seven claims were in pre-negotiation, twelve claims were in negotiations, six settlement agreements were being implemented, and nine agreements had been implemented.¹⁸

According to OSAA, the table demonstrates that Ontario is making progress in reducing the backlog of land claims awaiting internal review and is speeding up the process generally, particularly for claims received between 1996 and 2004:

Ontario has learned a great deal about the process and practice of settling land claims.... [The] practice of land claims negotiations in the province is maturing with a consequent quickening in the pace of settlements.¹⁹

The province should be commended for improving the provincial land claims process. However, the record also shows that the process is not yet keeping up with

the caseload. As of April 2005, almost fifty claims had not yet passed the historical review phase. Sixty claims had not passed ministerial review of eligibility for the negotiations process. It takes Ontario an average of almost seven years simply to decide whether to accept a claim for negotiation. On more than two-thirds of the active claims in the system, the long, arduous process of actually negotiating the claim has not even begun.

OSAA advised the Inquiry that it should be able to reduce the pre-negotiation assessment period. This would be commendable, but I believe that the period must be reduced significantly. The keys are adequate resources, improved institutional supports, and a more strategic approach to addressing land claims.

Two other aspects of the pre-negotiation stage are concerning. First, the Ontario process assesses the eligibility of a claim based not only on the historical or legal merits, but also on a “policy review” that appears to include an assessment of interests in the area affected by the claim, land values, and local Aboriginal/non-Aboriginal relations.²⁰ This raises the possibility that Ontario may refuse to negotiate a claim even if it has been shown to be valid in an historical and legal sense. The “policy review” is one of the key objections to the Ontario claims process raised by the Chiefs of Ontario.²¹

Second, the minister alone decides whether the claim should be accepted for negotiation. Although I fully understand that the minister, and eventually the Cabinet, must concur in any agreement reached through negotiations, it does not seem in keeping with the purpose of the claims process for the minister to decide, unilaterally, whether a claim merits access to the negotiating process.

I accept that a First Nation must meet a clear legal threshold before a claim will be accepted for negotiations. But given that the aim of the claims process is to provide a less adversarial, less expensive, and more interest-based alternative to litigation, the decision to accept a claim into the process should not be controlled by the provincial government unilaterally.

By way of contrast, access to the federal process depends on an assessment of the legal merit of the claim, performed by the Department of Justice. If Canada refuses to negotiate a specific claim because it believes it has no outstanding legal obligation, the First Nation can ask that the decision be reviewed by an independent body, the Indian Specific Claims Commission (ISCC). However, It is important to note that, under the present system, if the ISCC finds that the claim is valid, it can only recommend to the federal government that it negotiate the claim. The federal government recently announced its intention to reform the Specific Claims process.²² A key part of the reform is establishing an independent tribunal to resolve disputes. This proposal is now under discussion in the federal parliament. The land claims process in Ontario would be much fairer if

access to the provincial negotiating process matched its federal counterpart.

The frustration created by decades of delay cannot be underestimated. The submission by the Grand Council of Treaty 3 gave an account of a claim which was settled through the Ontario process, but took decades to complete. In the claim by the Assabaska First Nation in the Lake of the Woods area, there was a *prima facie* case of illegally taken lands. They filed the statement of claim in 1977. An agreement was reached in 1999, twenty-two years later. According to the First Nation, this delay exposed its people to “mistrust and hatred by their neighbouring non-native communities for over 20 years.”²³ The First Nation also wrote that “The longer such an issue remains unresolved, the more anger and resentment is allowed to brew—a recipe for another Ipperwash-type incident.”²⁴

The lack of transparency and accountability in the land claims process in Ontario is a further area for improvement. OSAA maintains a website which provides general information and statistics about the land claims process in Ontario. It cooperated with the Inquiry by providing information upon request and by participating in the Inquiry roundtables. These efforts improve transparency and accountability, but they do not achieve it. I believe that a continuous independent public accounting of the land claims process in Ontario is imperative.

4.4 Improving Land Claims Processes in Ontario

My recommendations for improving the land claims process in Ontario are directed at establishing an independent Treaty Commission of Ontario to facilitate and oversee the process in Ontario, important, structural reforms to the way that claims are considered, the commitment of greater resources to the land claims process, and improved federal-provincial cooperation. I discuss complementary improvements in public education about Aboriginal peoples and to the capacity of the provincial government and First Nations in chapters 7 and 8 respectively.

Reform in every area is essential, because reform in one area without matching or consistent reform in the others is likely to be insufficient to address the needs in this province adequately.

These reforms respond to the basic issues I have already identified, including the need for harmonious and peaceful resolution of land claims and the need to improve the timeliness, effectiveness, and fairness of the current land claims system.

The overarching role and responsibility of the federal government in land claims cannot be underestimated. However, since this is a provincial inquiry, I focus primarily on provincial strategies and institutions. However, federal/provincial cooperation is crucial to the success of the initiatives I recommend.

The same basic legal regime has governed the land claims process in Ontario for approximately thirty years. No reasonable person could say that it has been effective. Clearly, creativity and new solutions are warranted in this area.

I am encouraged by the response to this issue at the Inquiry by the provincial government. OSAA advised the Inquiry that the provincial government is committed to settling land claims with First Nations and Canada, and that “clearly, it is in the public interest to find a fair and balanced resolution to Aboriginal land claims.”²⁵

My recommendations should not be regarded as a panacea. OSAA quite rightly points out that successful claims negotiations are very time consuming. Nevertheless, I am convinced that the proposed reforms will improve the efficiency, effectiveness, and fairness of the land claims process. In my view, they are practical choices that will achieve meaningful progress.

4.4.1 Objectives

The objective of resolving treaty and land claims must be much more than simply to settle a legal dispute. The aim must be to re-establish relationships that embody the commitment to mutual respect and mutual benefit that was the original foundation for the Indian nations and the Crown when they made treaties with each other.

I suspect that many people in Ontario see the settlement of land claims as a financial issue: “How much do we have to pay to settle the Indian problem?” Approached with that attitude, the claims process in Ontario will continue to generate frustration and anger rather than forming the basis of a constructive and mutually beneficial relationship. Instead of viewing claims settlements as once-and-for-all payoffs that end the treaty relationship, we should see them as new beginnings to ongoing relationships of peace and friendship. The negotiating process itself can contribute to such a relationship, but not if it is conducted in a combative, adversarial style, pitting “our historians against your historians” or “our lawyers against your lawyers.”

The land claims process must reflect, consistently and vigorously, the principles of treaty interpretation enunciated by the Supreme Court of Canada.²⁶ These principles govern the courts in adjudicating disputes about treaties. They should also guide the process that is an alternative to litigation. This approach to resolving treaty issues is particularly apt for Ontario, where many treaties go back to the early period of treaty-making. Documents were few and often imprecise, and much of the agreement was made orally.

Particularly where land and access to resources are at issue, the substance

of claims settlements should be forward-looking. Government negotiators should be concerned not with minimizing what First Nations will recover, but with restoring a stronger economic base to their communities. The Ontario government submission recognized the economic development objective of claims settlements, which I find encouraging.²⁷ Developments in fostering co-management and sharing of resources, a major part of the New Approach to Aboriginal Affairs released by the Government of Ontario, should link to and nourish the economic development aspect of claims settlements.

4.4.2 The Treaty Commission of Ontario

In my view, the efficiency, effectiveness and fairness of the land claims process in Ontario could be significantly improved by establishing a Treaty Commission of Ontario (TCO).

The TCO would not negotiate land claims or decide the meaning of treaties. It would not be a decision-making body. Its job would be to independently and impartially assist the governments of Ontario, Canada, and First Nations to negotiate settlements of land claims. The TCO would oversee the negotiation process to make sure that the parties are working effectively and making progress in negotiations.

The TCO could significantly reduce the adversarial quality of the process by imbuing it with the principles of treaty interpretation set out by the Supreme Court of Canada.

The TCO could also assist governments and First Nations in developing and applying a wide range of tools and processes for clarifying and settling issues in an expeditious and cooperative way.

Finally, the TCO could assist the parties to reach interest-based settlements that help to establish the positive, ongoing relationship between the provincial, federal and First Nation governments, and neighbouring communities necessary for working out consensual approaches to practical matters that go beyond purely legal issues.

Recommending a treaty commission for Ontario is not a new idea. The establishment of provincial treaty commissions was one of the central recommendations of the Royal Commission on Aboriginal Peoples:

The governments of Canada, relevant provinces and territories and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.²⁸

“Gathering Strength,” the response to the RCAP report by the Government of Canada, endorsed the idea of establishing independent treaty commissions “where its partners agree that such an approach would be useful.”²⁹

Treaty commissions have been established in three provinces. The British Columbia Treaty Commission was established in 1993. Unlike the case in Ontario, very few First Nations in British Columbia had existing treaties with the Crown. The purpose of the BC Treaty Commission is to facilitate the process of making new treaties on land and self-government.³⁰ An Ontario Treaty Commission would be concerned with breaches of treaties made in the past. However, although the BC commission has a different function, it was organized and continues to be maintained through an agreement of First Nations and governments of Canada and British Columbia and is therefore a good precedent for the tripartite support needed for the Treaty Commission of Ontario.³¹

Saskatchewan and Manitoba also have treaty commissions. Both were established through bilateral agreements between Canada and organizations representing the treaty nations of the province. To date, the provincial governments have not participated directly in the work of either of these commissions. The Office of the Treaty Commissioner in Saskatchewan was first established in 1989 to review treaty land entitlement issues and treaty education. In 1996, the Federation of Saskatchewan Indian Nations and the Government of Canada agreed to expand the commissioner’s mandate “to create an effective forum for advancing their treaty discussions.”³² Now, the commissioner’s mandate is primarily to foster a common understanding of treaty relations in the province. The mandate does not extend to facilitating the settlement of claims arising from treaties.

The Manitoba Treaty Relations Commission is much newer. It was established in 2003 by the federal Minister of Indian Affairs and Northern Development and the Grand Chief of the Assembly of Manitoba Chiefs.³³ It, too, has a mandate to undertake public education to improve understanding of treaty relationships. It has a mandate to facilitate discussion of treaty issues in the province, but as it the case in Saskatchewan, its mandate does not include facilitating the settlement of specific claims arising from breaches of treaties.

The TCO that I propose is both consistent with and an advance from these three commissions. In some ways, the TCO is an evolutionary step beyond the Indian Commission of Ontario. However, I believe that the TCO will be much more effective.

Not everyone agreed that a treaty commission is needed in Ontario. According to OSAA, third-party intervention in land claims negotiations, of the kind I envisage for the TCO, can be useful in some cases, but it is, on balance, not necessary in all. OSAA stated that the ICO was necessary because there was a

lack of qualified dispute resolution professionals at the time, and it may now be more cost-effective to employ dispute resolution experts as needed rather than to re-establish an ICO-like institution.³⁴

With respect, I disagree. Individual dispute resolution professionals cannot provide the institutional capacity, resources, and processes which I believe are necessary to achieving real reform in this area. Nor can individual professionals provide the accountability, transparency, or educational benefits which Ontarians need to understand land claims better.

4.4.2.1 Permanence, Independence, and Governance

The Treaty Commission of Ontario should be independent and it should be permanent. It must also have the confidence of all three parties to the treaty relationship in Ontario: the provincial government, the federal government, and the First Nations of Ontario.

The independence of the TCO will be assured by establishing it as an independent commission which reports to the Legislative Assembly, not to the Government of Ontario. In effect, the TCO should have the same legislative status and independence as the Environmental Commissioner of Ontario. The TCO, like the Environmental Commissioner, should have a permanent administrative, legal, and research staff, fully independent from governments and First Nations.

To further ensure independence, First Nations and the Ontario and federal governments must all be involved in selecting its head, the Treaty Commissioner of Ontario. The way to provide for this in the statute must be worked out through discussions among the parties. The independence of the TCO requires that the commissioner serve for a fixed but renewable term, say five years, and that the appointment be terminated only upon agreement by First Nations organizations and the Legislative Assembly of Ontario.

It is important that the TCO be permanent and avoid the fate of the Indian Commission of Ontario. The ICO effectively closed after the federal Minister of Indian Affairs unexpectedly declined to renew the order-in-council, notwithstanding the recommendation of a tripartite steering committee that its mandate be renewed for another five years.³⁵ In my view, this means that the TCO must be established in a provincial statute, carefully framed to make it clear that its purpose is to enable Ontario to better discharge its treaty responsibilities.

The provincial government should make every reasonable effort to establish the TCO with the full cooperation of the federal government. If that is not possible, however, the provincial government should proceed to establish the TCO on its own in cooperation with First Nations in Ontario.

Finally, to get the TCO off to a strong start with the people of Ontario, Aboriginal and non-Aboriginal, it should be inaugurated in a prominent and ceremonial way. I suggest a meeting of First Nation leaders, federal and Ontario First Ministers and Aboriginal affairs ministers, and opposition party leaders at Niagara Falls. The ceremony should recall the 1764 Treaty of Niagara and renew its promises of mutual support and respect. The public education value of the event could continue with an annual celebration of its anniversary on an Ontario Treaty Day. Ontarians would be reminded each year that they are all treaty people. It would be best if Treaty Day were held on a school day, with every school in Ontario provided with a suitable presentation on the promises made at Niagara on the first Treaty Day.

4.4.2.2 Mandate and Powers

The TCO would share some of the features of other provincial treaty commissions. Like the Saskatchewan and Manitoba commissions, it should have an education mandate to promote public understanding of the historic roots of treaties in Ontario, their constitutional status, and their continuing importance to the province. The TCO should also follow British Columbia in having the federal and provincial governments and First Nations supporting and participating in its work. However, unlike the other provincial treaty commissions, the Treaty Commission of Ontario must have a mandate to facilitate the timely and fair settlement of claims arising from the breach of treaty obligations by the federal and provincial Crown. That should be its primary mandate. In effect, it would replace and update the Indian Commission of Ontario as the provincial agency for overseeing and facilitating the process for dealing with First Nation claims, but with a broader and stronger mandate.

I recommend, therefore, that the TCO be given a strategic mandate to assist governments and First Nations find more efficient and fairer ways of settling claims. In my view, the TCO's strategic mandate should include four parts:

First, the TCO should be given the authority to assist governments and First Nations, independently and impartially, in developing and applying a wide range of tools and processes for clarifying and settling issues in an expeditious and cooperative way. To further that aim, the TCO should be given the authority to prioritize, consolidate, or batch claims in whole or in part, to encourage joint fact-finding and historical research, to identify consensual ways of dealing with issues common to claims associated with a particular treaty or region, and to encourage interest-based settlements.

The TCO should also have the authority to work with the parties to simplify

the process for claims that require relatively little historical or legal research and to find ways to unblock bottlenecks in the process.

I believe that this approach could result in a much more efficient process. It would not only consume less time, it would also avoid duplication of effort by governments and First Nations and would tailor the process to the nature of the claim.

Second, the TCO should be given a mandate to improve the efficiency and cost-effectiveness of land claims in Ontario. It should be given the authority to work with parties to establish and publish benchmarks for the processing of claims and to require parties to use various forms of dispute resolution, binding as well as non-binding, if the benchmarks are not met.

Third, the TCO should have a mandate to make the claims process accountable and transparent to all Ontarians. As the Environmental Commissioner of Ontario does, the TCO should keep the public and the parties informed of the process and its achievements and failures, offering explanations for failures and suggestions for making the process work better.

Like similar commissions or offices with a public accountability function, the Treaty Commissioner should report annually to the Legislative Assembly, and to the Ontario public, on the overall state of the claims process and on particular successes and problems. In addition, the commissioner should be mandated to publish reports on specific situations where one or more parties are exceptionally uncooperative or causing unreasonable delay. I realize that governments, including First Nation governments, do not welcome potential exposure to public criticism in this way. However, I believe that it would provide a strong incentive to the parties to do their best to avoid prolonged deadlocks and unreasonable delays.

Fourth, the public education function of the TCO should be considerably more robust than the ICO mandate “to acquaint the residents of Ontario with the nature of the matters before the ICO.”³⁶ The TCO should be given a broad mandate to undertake public education about treaties, treaty relationships, and land claims in Ontario, and the specific authority to develop programs on treaty history designed to be part of the Ontario school curriculum.³⁷

4.4.2.3 Resources

Resources for the TCO must be better than they were for the ICO. Before its budget was cut by about 25% in 1996, the annual ICO budget had reached about \$1,160,000. The TCO must produce better results and it will have an important education function. It will therefore need more money than was allocated to the ICO at its peak.

The 2005/2006 operating budget for the BC Treaty Commission was

\$2.19 million. The BC Commission has a full-time commissioner, four part-time commissioners, and thirteen staff. The Government of Canada contributes 60% and the BC government contributes 40%. In addition to its operating budget, the BC Treaty Commission funds support for negotiation. Since it opened its doors in May 1993, it has allocated approximately \$362 million in negotiations support funding, to more than fifty First Nations—\$289 million in the form of loans and \$73 million in the form of contributions.³⁸

Both levels of government should fund the TCO, as they do in BC. Both governments have treaty responsibilities, and both governments have a significant interest in improving the land claim process in Ontario.

I do not consider the BC budget allocations as a precedent or benchmark for the TCO. The circumstances and needs are unique to each province. I recommend that the federal and provincial governments negotiate an appropriate sum to ensure that the TCO can achieve its objectives.

The resources invested in the TCO should be considered an investment in a faster, fairer, more flexible process for settling land claims, one that should pay for itself by eliminating many of the significant costs of dealing with Aboriginal occupations and protests.

4.5 Other Provincial Initiatives to Support the Land Claims Process

Establishing the TCO is my key recommendation for improving the land claims process in Ontario. However, the TCO alone will not be able to achieve significant progress on land claims without several other initiatives at the provincial and federal levels. Five provincial issues are crucial:

- Eligibility for the Ontario land claims process
- Consideration of non-Aboriginal interests
- Provincial capacity, coordination, and support
- Accountability and transparency
- Funding

I discuss federal issues later in this chapter.

4.5.1 Eligibility to Enter the Ontario Land Claims Process

In an expeditious and fair process, the threshold decision on whether a claim will be negotiated should not wait almost seven years to be made unilaterally by

a minister. That threshold decision should be simply a determination of whether the documentation supporting a First Nation statement of claim provides sufficient grounds for bringing the parties together to work out a negotiated settlement of the claim. The threshold decision that in effect opens or closes the gateway to negotiations should be made by the Treaty Commission through its registration process.

There should be provision for a party to appeal the decision of the TCO, either to the independent tribunal contemplated under pending federal legislation (which I will discuss below) or to the courts. Appeal to the courts would mean losing the advantages of the claims negotiating process. That would be regrettable, but it would be better to proceed at the earliest possible stage rather than after years of waiting for a ministerial decision. Moreover, a decision that a claim lacks sufficient substance to merit an effort at a negotiated settlement may be easier to accept, after full argument before a court of law, than it would be when the decision is made by a minister alone.

I recommend that access to the claims process depend entirely on whether the documentation filed by the First Nation provides *prime facie* evidence that there has been a breach of the legal obligations of the Crown. I have pointed out that, under the current Ontario process, a finding of legal obligation based on an historical review and legal review of a claim does not commit Ontario to negotiating the claim. Over and above the review of the legal merits, there is a policy review and a final decision by the Minister Responsible for Aboriginal Affairs. During the years this process has been operating, the minister has rejected only two claims that have passed through the historical and legal review stages. Nevertheless, the requirement for a ministerial decision delays negotiations and applies policy considerations which should be taken up in the negotiating process, not in assessing the eligibility for negotiation.

Eliminating the ministerial gatekeeper will not, by itself, resolve delays in the land claims process,³⁹ but it would bring the Ontario process more closely in line with the federal Specific Claims Process and promote consistency and coordination between the two governments. Access to the federal process depends on an assessment by the Department of Justice of the legal merits of the claim. If the Department finds that the claim has substance, “Canada will negotiate with the First Nation in an effort to agree on compensation.”⁴⁰

4.5.2 Consideration for Non-Aboriginal Interests

One aspect of the existing Ontario process that is working well is the attention to ensuring that non-Aboriginal communities and interests which may be affected

by the settlement of a land claim are kept informed of the claim and that their concerns are considered during the negotiation. A variety of third-party interests may have concerns about a given claim. More often than not, the Ontario process deals with land claims that go beyond monetary compensation to call for some adjustment of reserve boundaries or that raise other land issues. Municipalities will be concerned about the implications of additions to reserves where municipal services, infrastructure, and the municipal tax base are involved. Businesses involved in extracting natural resources in the area of the claim will be concerned about the possible impact on their investments and revenues. Land developers will be concerned about the security of their investments and property rights. Recreational users of lands and waters in the area will be concerned about possible restrictions on their activities. Non-Aboriginal residents in the area will want reassurance that their properties will not be expropriated and that their convenient access to their properties will not be impaired. These are reasonable and settled expectations that the provincial land claims process properly acknowledges. When land claims are asserted in the urban areas of Southern Ontario, these concerns are likely to be especially acute. Caledonia is the most prominent example.

The provincial government keeps third parties informed of land claims and tries to ensure that third parties are given an opportunity to voice their concerns. As the OSAA paper put it, the Ontario process seeks “to configure the negotiation process in such a manner that the parties move closer together rather than further apart,” and to do this in way that does not permit a third-party veto over land claim settlements.⁴¹ According to OSAA, it is not unusual to find negotiators spending half of their negotiating time on public consultation activities.

This program of public consultation is one part of the Ontario process that enhances accountability and it should be continued. In addition to contributing to the accountability and openness of the land claims process, it has the potential to lead to settlements that strengthen relationships between First Nation communities and their non-Aboriginal neighbours.

Settling claims without damaging the interests of non-Aboriginal people is a long-standing principle of the land claims policy in Ontario. An important part of this policy is that expropriation of private property as a means of settling claims is ruled out. However, the province “may agree to buy land from an owner on a willing seller/willing buyer basis where it will help achieve a satisfactory settlement of a land claim.”⁴² This is what the province did at Caledonia.⁴³ Access to private property is also assured. This policy extends beyond privately owned land to lease-holders on Crown lands. Potential impacts on existing commercial use of land “are minimized as much as possible.”⁴⁴ This means that settlements must avoid

revoking mining claims or timber allocations or other licenses and permits before they expire.

It is not difficult to understand the political rationale for this part of the land claims process. It would be difficult to find majority acceptance for the claims policy without assurances that non-Aboriginal communities and interests have nothing to fear from the settlement of land claims. However, it is important to recognize that, from the perspective of First Nations, according this privilege to non-Aboriginal property and economic interests is difficult to accept. This is especially so when the private property or commercial interest protected by the policy is on land proven to have been taken from or denied to a First Nation illegally.

Although I do not suggest that this part of Ontario's claims policy be changed, I recommend that the province make the policy and the rationale for it much more widely known. Non-Aboriginal people tend to see the result of land claims in terms of Aboriginal people gaining land at their expense. Acknowledging that the land claims policy aims to protect non-Aboriginal property and interests even when it means that Aboriginal people will be unable to recover lands that are rightfully theirs, might serve to correct this false perception. At the same time, Ontario should continue to emphasize in its public consultations the ways in which land claim settlements can generate benefits locally and contribute to the general economic progress of the province. This approach will help to foster understanding that treaty relationships contribute to the wellbeing of everyone in Ontario.

4.5.3 Provincial Support, Capacity, and Coordination

To be effective the land claims process in Ontario and the TCO will need the strong support of the Ontario government. I believe it is more likely to receive that support if Ontario follows the example of British Columbia and creates a stand alone ministry dedicated to Aboriginal affairs. In chapter 8, I discuss the merits of establishing an Ontario Ministry of Aboriginal Affairs in more detail.

4.5.4 Funding and Planning

If the claims process is to become a creditable way to resolve past injustices that can secure the confidence of First Nations, it must be adequately funded. The effectiveness of new structures and processes will be greatly diminished if they are not accompanied by a commitment to fund the process to the degree necessary. Funding must be adequate in two ways. First, governments must be willing to commit enough funds to enable the process to resolve claims within an acceptable period. Second, if the process is to be fair as well as efficient, funds

must be available for First Nations to participate in the claims and for compensation for breaches of legal obligations.

Funding and business planning go hand in hand. Governments must be able to predict, with reasonable certainty, what may be paid out in compensation in a given year. The provincial government and TCO, working closely with First Nations and the federal government, should therefore develop a business and financial plan to estimate the resources needed to resolve claims and to meet reasonable benchmarks during the land claims process. Once completed, the province and TCO would be able to estimate an annual budget allocation for settling treaty and land claims. The estimate should be made public, of course, so that it may be understood and, if necessary, debated publicly and in the Legislature.

I realize that, with so many claims in the system, what I am suggesting will take complex planning, and that success will depend not only on adequate funding, but also on the availability of the necessary human resources—experienced lawyers, knowledgeable historians, and capable mediators. I am convinced that these people can be found in Ontario, and that significant economies can be realized by abandoning the adversarial approaches of the past.

There is no question that a reformed and revitalized claims process will require more money than Ontario or Canada have been prepared to spend on settling claims in the past. I noted earlier that the 2001 federal contingent liability for specific claims was estimated at more than \$2.6 billion⁴⁵ and that we do not have an equivalent estimate for Ontario. The fiscal planning exercise I recommend would provide such an estimate, at least in part.

In considering the merits of spending more money on settling land claims, the provincial government and the people of Ontario must bear three things in mind. First, the money and land in settlement of claims discharges a debt found to be owing to First Nations. It is not a donation. Second, the money or land that First Nations gain from settling claims contributes to the local and provincial economies. It will strengthen the economic base and self-sufficiency of First Nations, which is in the interest of us all. Third, the cost of failing to settle claims is very high, and rising.

4.6 Federal-Provincial Cooperation

Federal-provincial cooperation is clearly an essential feature of an effective process for settling land claims in Ontario. Ontario claims arise from treaties between First Nations and the Crown. In our federal constitutional structure, the Crown exercises its authority and discharges its responsibilities through two levels of government, federal and provincial. In Ontario, the Crown in right of

Canada and the Crown in right of Ontario are inextricably intertwined in treaty relations. They must work together in resolving treaty issues and land claims.

It is important to understand the historical and constitutional foundation for this federal-provincial responsibility. When the Canadian federation was formed in 1867, the federal government took over from Britain the responsibility for treaty relations with Indian nations and the obligation to carry out the policy stated and the promises made in the 1763 *Royal Proclamation*. After Confederation, the federal government entered into treaties with Indian nations to acquire land for new settlements and economic development. This means that the federal government, as the Crown in right of Canada, is a party to all of the treaties, pre-Confederation and post-Confederation, which together cover nearly all of Ontario. Also, under the Constitution of Canada, the federal government and parliament have exclusive control over the lands which, through treaties, became Indian reserves, and for any dealings relating to those reserve lands. Thus, the federal government must be a party to any negotiation concerning Ontario treaties and the obligations arising from them.

The Ontario government, as the Crown in right of the province, has exclusive jurisdiction over the off-reserve lands and resources which, through treaties, First Nations agreed to share with European settlers. This means that the provincial government, as the custodian of provincial Crown lands, is responsible for any adverse effect on First Nation treaty rights arising from development on these lands. It must be a party to any land settlement that would return provincial Crown lands to reserve status. Thus, the Ontario government must be involved in the settlement of most land claims in the province.

Even though federal-provincial cooperation is essential, there has been no systemic, institutional coordination of federal and provincial participation in the settlement of land claims in Ontario since the ICO closed in 2000.

There have been some recent efforts to revitalize the tripartite process in dealing with Aboriginal issues in Ontario. The first intergovernmental meeting in seven years which involved Aboriginal leaders and ministers of the federal and Ontario governments was held on June 10, 2005. Since then, a number of tripartite initiatives have been launched and meetings have been held.

As I write this report, it appears that the current tripartite process is stalled. In my view, this underscores the need for a more formal and ultimately more effective institutional structure to address land claims in Ontario, with better resources and a better strategy.

The situation in Caledonia demonstrates the urgency, but there are some encouraging signs in the present circumstances. The tripartite initiative shows that all three parties to land claims in Ontario acknowledge the need for such a

tripartite body or process. The federal government agrees with First Nations that the status quo in handling specific claims “is not sustainable.”⁴⁶ Potential amendments to the *Specific Claims Resolution Act (SCRA)* aim to meet Aboriginal objections by establishing the Canadian Centre for the Independent Resolution of First Nations Specific Claims. The Centre would have two divisions: a commission to facilitate claims negotiations and a tribunal to resolve disputes.

If the *SCRA* is amended in ways that meet Aboriginal concerns and obtain parliamentary approval, it would fit well with the Treaty Commission of Ontario I recommend. Like the proposed federal commission, the TCO would facilitate the settlement of claims, and where appropriate, enable parties to make use of the new federal tribunal.

Federal/provincial cooperation will be crucial to the sustained effectiveness of the TCO. Both governments must commit to its success through funding and through political and administrative support. Establishing the TCO in cooperation with First Nations would be very much in keeping with the commitment by the Government of Ontario to develop a new and respectful relationship with Aboriginal peoples in the province.⁴⁷

Federal/provincial cooperation with respect to the TCO should be complemented by other federal/provincial initiatives to improve the efficiency, effectiveness, and fairness of the land claims process in Ontario in the areas of claims registration, dispute resolution, legal liabilities, and common benchmarks/policies.

As with the establishment of the TCO, the provincial government should make every reasonable effort to seek the federal government’s cooperation on these issues. If that cooperation is not forthcoming, however, the provincial government should proceed to address these issues on its own in cooperation with First Nations in Ontario.

4.6.1 Registration

Eliminating confusion about the level of government to which First Nations in Ontario should submit claims is a crucial area where federal-provincial cooperation in a reformed claims process is essential. In their submission to the Inquiry, the Chiefs of Ontario pointed to the virtual impossibility of untangling the respective responsibilities of Canada and Ontario.⁴⁸

It must be possible for the two governments, or the two commissions when they are established, to create a common registry for Ontario claims. The claims process would be less frustrating and confusing for First Nations and more timely and efficient for everyone. Cooperation on a common registry is more likely

if the claims process at both levels is under the aegis of an independent commission instead of officials of the two governments. If Ontario abandons the application of policy considerations and ministerial approval in admitting claims to the negotiating process as I recommend, the federal and provincial processes will be subject to the same criteria. This will also facilitate a common registry for land claims.

4.6.2 Dispute Resolution

An important responsibility of the TCO will be to work with the parties to make use of a variety of dispute resolution techniques to overcome the impasses and bottlenecks which have simply stopped progress in negotiations for years and years. Dispute resolution methods work best when the parties participate in them voluntarily, but there is too much at stake here to give any party veto power over the decision to resort to a procedure to break the deadlock. I agree with Professor Coyle that where disagreements on crucial questions of history and law arise in the negotiations and have not been resolved within a reasonable time, a party should be able to ask the TCO, as the claims facilitation body, to require that the parties obtain the non-binding legal opinion of a jointly selected expert.⁴⁹ Moreover, when the impasse continues after consensual dispute resolution methods have been attempted, it would be best, in my view, if a party could request a binding resolution, either from a federal claims tribunal if one has been established, or from a third-party arbitration process established by Ontario.

This dispute resolution structure would significantly improve the fairness of the land claims process in Ontario, but establishing key parts of it depends on federal-provincial cooperation. For example, the provincial and federal governments would have to agree to binding arbitration for claims. The provincial government would be extremely unlikely to agree to be subject to binding arbitration if the federal government does not, and it would be unfair in any event. Moreover, given that the federal parliament has exclusive jurisdiction over “Indians, and Lands reserved for the Indians,” binding arbitration within the Ontario process would probably have to be authorized by federal legislation.⁵⁰

4.6.3 Legal Liabilities

The settlement of land claims in Ontario is often impeded because the federal and provincial governments do not agree on their respective legal liabilities. It is very difficult, and in my view inappropriate, to try to resolve disputes of this kind by political means. Such disputes are best resolved by professional and independent arbitration, and I urge the federal and provincial governments to

agree to use binding arbitration by a mutually chosen arbitrator. The “honour of the Crown,” a principle that the Supreme Court of Canada says should guide relations with Aboriginal peoples, must surely mean that disputes between the two faces of the Crown should not be a barrier to rectifying injustices to Aboriginal peoples.

4.6.4 Benchmarks and Policies

Federal-provincial cooperation to establish a common registry and agreed-upon instruments for settling legal disputes would go a long way to improving the land claims process in Ontario.

Another helpful initiative would be federal-provincial collaboration in working out benchmark time periods for each stage of the claims process, and common, or at least consistent, policies and processes.

I believe that this kind of collaboration is more likely if the participants are independent federal and provincial commissions rather than government departments.

Recommendations

1. The provincial government should establish a permanent, independent, and impartial agency to facilitate and oversee the settling of land and treaty claims in Ontario. The agency should be called the Treaty Commission of Ontario.
2. The Treaty Commission of Ontario should be established in a provincial statute as an independent agency reporting directly to the Legislative Assembly of Ontario. The Treaty Commission of Ontario should have permanent administrative, legal, and research staff and should be fully independent from the governments of Canada, Ontario, and First Nations. The statute should specify that the purpose of the Treaty Commission of Ontario is to assist Ontario in discharging its treaty responsibilities.
3. The provincial government should make every reasonable effort to establish the Treaty Commission of Ontario with the full cooperation of the federal government. If that is not possible, the provincial government should establish the Treaty Commission of Ontario on its own in cooperation with First Nations in Ontario.
4. The governments of Ontario, Canada, and First Nations should jointly select

the head of the Treaty Commission of Ontario—the Treaty Commissioner of Ontario. The selection process should be set out in the statute following discussions among the parties. The Treaty Commissioner should serve for a fixed but renewable term and should be removed only upon agreement by First Nations and the Legislative Assembly of Ontario.

5. The Treaty Commission of Ontario should be inaugurated in a prominent and ceremonial way. The ceremony should recall the 1764 Treaty of Niagara and renew its promises of mutual support and respect.
6. The Treaty Commission of Ontario should be given a four-part, strategic mandate:
 - a. The TCO should be given the authority to assist governments and First Nations, independently and impartially, in developing and applying a wide range of tools and processes to clarify and settle issues in an expeditious and cooperative way. In furtherance of this mandate, the TCO should be given the authority to prioritize, consolidate, or batch claims, in whole or in part, to encourage joint fact-finding and historical research, to identify and find consensual ways of dealing with issues common to claims associated with a particular treaty or region, and to promote interest-based settlements.
 - b. The TCO should be given the mandate to improve the efficiency and cost-effectiveness of the land claims process in Ontario. The TCO should be given the authority to work with parties to establish and publish benchmarks for processing claims and to require parties to use various forms of dispute resolution, binding as well as non-binding, when the benchmarks are not met.
 - c. The TCO should be given the mandate to make the claims process accountable and transparent to all Ontarians.
 - d. The TCO should be given a broad mandate to undertake public education about treaties, treaty relationships, and land claims in Ontario. The TCO should be given the specific authority to develop programs about treaty history designed to be part of the Ontario school curriculum.
7. The provincial and federal governments should commit sufficient resources to the TCO to enable it to achieve its objectives.

8. Access to the Ontario land claims process should depend entirely on whether the documentation filed by the First Nation provides *prime facie* evidence that there has been a breach of the legal obligations of the Crown.
9. The provincial government should improve public education about its land claim policies.
10. The provincial government should commit sufficient funds to enable the Ontario land claims process to resolve claims within an acceptable period. This includes funding for First Nations to participate in the land claims process and for compensation for breaches of legal obligations by the Crown.
11. The provincial government and the TCO should work together to develop a business and financial plan for the Ontario land claims process. The objective would be to estimate the resources needed to resolve claims and to meet reasonable benchmarks during the land claims process.
12. The federal government should cooperate fully with the provincial government and First Nations in Ontario to establish the Treaty Commission of Ontario and promote its effectiveness.
13. The federal and provincial governments should work with the TCO and any equivalent federal agency to improve the efficiency, effectiveness, and fairness of the federal and provincial land claims processes. Together, they should undertake to do the following:
 - a. Establish a common registry for federal and Ontario land claims.
 - b. Establish a dispute resolution process that includes access to non-binding and binding resolution.
 - c. Use binding arbitration to determine the legal liabilities of the federal and provincial governments.
 - d. Develop common or consistent benchmarks and policies for federal and Ontario land claims.

The provincial government should make every reasonable effort to seek the federal government's cooperation on these issues. If that cooperation is not possible, the provincial government should proceed to address these issues on its own in cooperation with First Nations in Ontario.

Endnotes

- 1 Province of Ontario, Ontario Native Affairs Secretariat, “The Resolution of Land Claims in Ontario: A Background Paper” (Inquiry project), p. 6.
- 2 I appreciate that statistical “box scores” on complex issues can sometimes be misleading. In this instance, however, I believe that this analysis is an appropriate measure of the historical record.
- 3 Michael Coyle, “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future” (Inquiry research paper), p. 52. Professor Coyle’s data are drawn from the Ontario Native Affairs Secretariat website and are presented in Appendix 6 of his paper.
- 4 *Ibid.*, p. 56.
- 5 Indian and Northern Affairs Canada, “Mini Summary by Province, Specific Claims Branch,” <http://www.ainc-inac.gc.ca/ps/clm/misp_e.html>.
- 6 The allegations include failure to provide land as required by treaty; taking of reserve land without a proper surrender; failure to live up to the terms of a reserve land surrender; failure to protect reserve lands (for example from flooding); and mismanagement of First Nation trust funds garnered from land surrenders.
- 7 A leading example of such a claim is the Algonquins of Golden Lake claim to 3.4 million hectares of the Ottawa Valley.
- 8 More than thirty claims allege that a First Nation did not receive the reserve lands to which it was entitled, which means Ontario has wrongly received lands; over twelve claims allege damage to reserve lands from flooding resulting from provincially authorized water projects; at least six claims assert that Ontario built highways across reserve lands, either without proper legal authority or without paying compensation; and at least six claims concern alleged failures by Ontario either to sell surrendered reserve lands or to pay the proceeds of the sale to the First Nation.
- 9 Province of Ontario, Ontario Native Affairs Secretariat.
- 10 *Ibid.*, p. 22.
- 11 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 54.
- 12 Province of Ontario, Ontario Native Affairs Secretariat, p. 35.
- 13 *Ibid.*, pp. 32-4.
- 14 *Ibid.*, p. 22.
- 15 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 54.
- 16 Province of Ontario, Ontario Native Affairs Secretariat, pp. 25-7.
- 17 *Ibid.*, p. 23.
- 18 Information from Ontario Native Affairs Secretariat, January 2007 (on file with the Inquiry), update to its report of April 2005.
- 19 Province of Ontario, Ontario Native Affairs Secretariat, p. 27. The table shows that between 1973 and 1985, there were twenty-six active land claims. During this period, no settlements were concluded and the province was only able begin negotiations on two claims. By way of contrast, in the period between 1996 and 2004, there were eighty-six active claims, thirty-six of which had passed through legal review, including nine agreements in principle and five final agreements.
- 20 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 48. See also Province of Ontario, Ontario Native Affairs Secretariat, p. 19.
- 21 Chiefs of Ontario Part 2 submission, pp. 23-4.

- 22 Indian and Northern Affairs Canada, "Backgrounder, Canadian Centre for the Independent Resolution of First Nations Specific Claims," <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/02433bk_e.html>.
- 23 Chiefs of Ontario, Grand Council Treaty #3, "Reconciling the Relationship" (Inquiry project), p. 6.
- 24 Ibid.
- 25 Province of Ontario, Ontario Native Affairs Secretariat, p. 7.
- 26 I discuss the principles of treaty interpretation enunciated by the Supreme Court of Canada in chapter 3.
- 27 Province of Ontario, Ontario Native Affairs Secretariat, p. 10.
- 28 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), Part One, recommendation 2.2.15.
- 29 Canada. Indian and Northern Affairs Canada. *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: 1997), p.18.
- 30 The BC Treaty Commission's most recent report is: *Six Perspectives on Treaty Making* (Vancouver: BC Treaty Commission, 2006).
- 31 On the establishment of the BC Treaty Commission, see Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 1996).
- 32 Saskatchewan. Treaty Commissioner of Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: October, 1998), p. 3.
- 33 Indian and Northern Affairs Canada, News Release, November 19, 2003, "Memorandum of Agreement Signing for Treaty Relations Commission in Manitoba" <<http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02438e.html>>.
- 34 Province of Ontario, Ontario Native Affairs Secretariat, p. 35.
- 35 Coyle, "Addressing Aboriginal Land and Treaty Rights," pp. 41-7. The Indian Commission of Ontario (ICO) was established by a resolution of the Chiefs of Ontario and parallel orders-in-council by the federal and provincial governments in 1978. Professor Coyle's paper summarizes the mandate and history of ICO.
- 36 Ibid., p. 45.
- 37 I discuss the educational mandate of the Treaty Commission of Ontario in chapter 7.
- 38 See generally the BC Treaty Commission, "Funding," <http://www.bctreaty.net/files_3/funding.html> (accessed December 2006).
- 39 See Michael Coyle, "Senate Committee Submission on the Specific Claims Process," October 3, 2006, <<http://www.law.uwo.ca/info-news/senatesubmissioncoyle1.html>> (accessed February 16, 2007). Although the federal review of claims is based solely on legal/historical considerations, it appears to be at least as slow as the Ontario process, if not slower. Based on data provided by Indian and Northern Affairs Canada, the Ontario claims still under legal review were, on average, filed eight and a half years ago.
- 40 Coyle, "Addressing Aboriginal Land and Treaty Rights," p. 38. Since the federal government does not have jurisdiction over provincial Crown lands, it negotiates claims that seek only monetary compensation. This, of course, makes it of limited value to First Nations in Ontario, which often seek to recover land and access to resources through claims.
- 41 Province of Ontario, Ontario Native Affairs Secretariat, p. 12. For example, the Secretariat reported that as soon as negotiations begin, "key stakeholders" are contacted. This notice initiates "a process of public consultation that will extend through the entire settlement negotiation and implementation process." This public consultation dimension of the process involves a range of approaches, including teleconferences,

newsletters, websites, and side-tables where stakeholders can discuss issues of concern with the parties.

- 42 Ontario Secretariat for Aboriginal Affairs, "Ontario's Approach to Aboriginal Land Claims" <<http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/approach.htm#private>> (accessed February 16, 2007).
- 43 Ibid., "Six Nations (Caledonia) Negotiations, Frequently Asked Questions," <<http://www.nativeaffairs.jus.gov.on.ca/english/caledonia/faq.htm#douglascreek>>.
- 44 Ibid., "Ontario's Approach to Aboriginal Land Claims."
- 45 Coyle, "Addressing Aboriginal Land and Treaty Rights," p. 54.
- 46 See note 22.
- 47 Ontario. *Ontario's New Approach to Aboriginal Affairs* (Toronto: Queen's Printer of Ontario, Spring 2005).
- 48 Chiefs of Ontario Part 2 submission, p. 22.
- 49 Coyle, "Addressing Aboriginal Land and Treaty Rights," p. 59.
- 50 Ontario has used this approach in the past, adopting parallel legislation with Canada to address First Nation land issues, as in the *Indian Lands Agreement Act*, S.O. 1988, c. 39, and its federal counterpart.

NATURAL RESOURCES

The need to reconcile our interests is not solely about fish, moose, deer or trap lines. Fundamentally, this is about life and the land and resources that support our existence and well-being. We want to be full partners in a plan that fairly and equitably manages the great wealth that the natural resources of this province provide. We will not continue to be made the poorest of the poor while all around us people use and exploit our resources to enrich themselves at our expense.¹

These words from the Chiefs of Ontario submission embody many of the important ideas I heard about natural resources during the Inquiry, and which I will consider in this part of my report. I cannot deal with all of the facets and complexities of this large subject here, and my discussion will focus on the ways in which it relates to the mandate of the Inquiry.

There are basically two ways in which the management of Ontario land and resources has a significant bearing on my mandate to make recommendations to reduce the likelihood of violence at Aboriginal occupations and protests. First, there is the rights protection dimension—the obligation of the province to respect and accommodate Aboriginal and treaty rights in its management and regulation of lands and resources. The practical objective here is to avoid situations in which Aboriginal communities feel that the only way they can protect their rights and interests is to confront provincial authorities or other parties through blockades and occupations or other forms of direct action. Second, there is the dimension of interests and opportunities—the benefits that flow to all of us from strengthening the economies of Aboriginal peoples and enabling them to share in the development of the province. The anger and despair that leads to conflict and confrontation will surely diminish as the marginalization of Aboriginal communities on small reserves is overcome and their people are no longer excluded from development opportunities on their traditional lands.

Disputes between Aboriginal peoples, governments, and third parties over natural resource development are perhaps even more common than disputes about land claims. Indeed, some of the most well-known and longest occupations and protests have been about natural resource issues, including the protests at Burnt Church, Temagami, Grassy Narrows, and the “War in the Woods” in British Columbia. The recent incident at Big Trout Lake in Northern Ontario, which I

discuss below, is an example of the growing tension surrounding these issues in Northern Ontario.

The regulation of natural resources also illustrates how Aboriginal rights, non-Aboriginal economic interests, and court intervention can collide in a combustible mix before, during, or after an Aboriginal occupation or protest. For many Aboriginal and non-Aboriginal people, the regulation and use of natural resources goes to the heart of their lives and livelihoods.

The issues and policies I consider in this section concern First Nations and Métis communities. First Nations have rights and interests relating to land and resources which stem from their treaty relations and expectations. Métis communities also have rights and interests, which have been recognized by courts, based on their traditional ways of obtaining sustenance from the land.

In this chapter, I discuss sharing and managing the natural resources of Ontario. First, I consider the constitutional duty of the provincial government to consult and accommodate with respect to Aboriginal rights and interests. Second, I consider strategies and initiatives to include Aboriginal peoples in natural resource development. Third, I consider the regulation of hunting and fishing and wildlife conservation.

5.1 Moving from Exclusion to Accommodation and Sharing

From an Aboriginal perspective, the history of the management of land and resources in Ontario is a history of exclusion and the denial of rights. In chapter 3, I reviewed the historical record of treaty rights with respect both to lands reserved for First Nations and traditional lands beyond reserves, which reveals that these rights were not always honoured or recognized, and that Aboriginal peoples were often excluded from the economic development of the province. Professor Coyle summed up the historical record this way:

Although hunting and fishing had been the mainstay of First Nation economies and a key focus of the treaties, in general Aboriginal people were not given hunting and fishing licenses to develop their economies. Equally, First Nations in Ontario were virtually excluded from the economic benefits offered by other resources within their traditional territories. This is a grievance that remains outstanding to this day.²

Jean Teillet made a similar point:

The natural resource regulatory regime in Ontario was developed to support and serve the economy and interests of the citizens of Ontario.

However, it has never supported or served the interests of all the people in Ontario. ... Part of Ontario's polity and economic complexity is the existence of Aboriginal peoples and an Aboriginal economy. The Aboriginal economy which has evolved over thousands of years is, for the most part, an unrecognized economy in the south of Canada.³

The relationship between natural resources, Aboriginal economic development, and Aboriginal occupations and protests is obvious to all experienced observers.

In its report to the Inquiry, the Nishnawbe-Aski Police Services Board described how the Constance Lake First Nation initiated protests against its exclusion from forestry, mining, and pipeline developments in its traditional territory:

Within a short span of three years, Constance Lake First Nation launched three different protests on three different resources based interests that have directly impacted their traditional territories. Elder Richard Ferris stated, *"the protests taken by First Nations at these sites were not to block or fight against development but we were trying to fight our way into the development. Our youth and people need the employment instead the developers were not sensitive to our needs and situation. We have to share in the development."* [Emphasis in the original.]⁴

The failure to recognize the rights and interests of Aboriginal peoples in the development of lands and resources in Ontario stems very much from sharply different understandings about the nature of the lands which Aboriginal peoples agreed to share with newcomers as opposed to those which they retained as reserves for their exclusive use and occupation. First Nations people regarded and continue to regard the lands they agreed to share as their "traditional lands," where the resources had for many years provided their sustenance. Although, in making treaties with the Crown they agreed to give up their exclusive Aboriginal title to these lands, they never intended to abandon them. They continue to regard these lands as a major source of their sustenance, and as fundamental to their identity. The promise of continued access to these lands was a crucial condition of their consent to the treaties.⁵

Every treaty in Ontario supported the expectation that treaty lands outside of reserves would be shared. Promises made by Crown representatives encouraged these expectations, but despite these promises, colonial and Canadian authorities referred to these lands as "surrendered lands." The term "surrendered lands" is inaccurate and misleading. It suggests that the treaties were made after the Indian nations somehow "lost" these lands. Moreover, "surrendered lands," con-

trary to the terms of the treaties, suggests that the First Nations gave up their continuing rights or interests in their traditional lands. A new approach to Aboriginal relations in Ontario requires a shared understanding of the rights and interests of First Nations in these traditional lands.

5.2 Negotiated Solutions and Provincial Leadership

The regulation of natural resources and activities on the off-reserve traditional lands of Aboriginal peoples is squarely within the constitutional jurisdiction of the provincial government. The provincial Crown owns approximately 87% of the land in Ontario. Much of this land is also the traditional territory of Aboriginal peoples.

Thus, the province has a central role in all facets of resource regulation as it relates to Aboriginal peoples in Ontario. Unlike its role in land claims, the federal government has a minimal role in regulating natural resources in Ontario.

As with land claims, negotiation, not confrontation, is the best way to achieve progress in reconciling treaty and Aboriginal rights with non-Aboriginal rights and interests. Occupations, protests, blockades, injunctions, civil litigation, provincial prosecutions, and other kinds of court proceedings should be last resorts. Unfortunately, both Aboriginal and non-Aboriginal parties often resort to direct action or litigation to ensure that their perspectives are acknowledged. The result is often frustration, delay, and missed economic opportunities which could potentially benefit all Ontarians.

Negotiated solutions will always work best to resolve the complex interaction of rights, expectations, and interests of Aboriginal and non-Aboriginal peoples in this area. The objective of all parties in conflicts over resource development and natural resources generally should be to develop peaceful, constructive, enduring solutions, consistent with Canadian law and with the broader economic and social interests of Aboriginal and non-Aboriginal peoples in Ontario.

Long-term economic development, either in general or for Aboriginal peoples, is not very likely if the Aboriginal and non-Aboriginal communities are at war with each other. This is why provincial government leadership is so important. The provincial government is in a unique position to bring together the various parties, organizations, and interests in a spirit of constructive cooperation and understanding.

Fortunately, in Ontario and across the country, there is a track record of successful projects to build upon. Perhaps even more fortunately, the provincial government has recently committed to “charting a new course for a constructive, co-operative relationship with the Aboriginal peoples of Ontario.”⁶ An important

part of this new approach is the “goal of closing the gap between Aboriginal people and the rest of its citizens” in the management of natural resources.⁷

In aiming to close the gap between Aboriginal peoples and other citizens, the Ontario government is acknowledging the past exclusion of Aboriginal peoples from the benefits flowing from natural resources found on traditional lands and from the management of these lands. Part of the impetus for this effort is the constitutional obligation of the province, as set down in recent Supreme Court decisions, to consult with and accommodate Aboriginal peoples when developments are proposed in areas in which treaty or Aboriginal rights are asserted. I wish to emphasize, however, that the rationale for including Aboriginal peoples in managing natural resources and enjoying their benefits goes beyond simply meeting legal obligations. There is also a strong, practical, interest-based rationale for this approach. It is to the benefit of all Ontarians that Aboriginal peoples share in the bounty of the province and in the care of its resources. Sharing resources and resource revenues is one way for Aboriginal peoples to take control of their lives, build viable economies, and improve the dire conditions under which many of them are forced to live. It is also a way for all Ontarians to avoid the costs of Aboriginal occupations and protests.

5.3 Fulfilling the Duty to Consult and Accommodate

5.3.1 *Haida Nation, Taku River, and Mikisew*

In chapter 3, I summarized a number of Supreme Court of Canada decisions which clarified the meaning of the Aboriginal and treaty rights recognized and affirmed in the Constitution of Canada. In three recent cases of particular relevance to this section, the Court dealt with the principle of the “honour of the Crown” and the duty of the government to consult Aboriginal peoples and accommodate their interests when contemplating any action that might impact on Aboriginal or treaty rights.⁸ These principles had been enunciated in earlier decisions by the Supreme Court.⁹ However, *Haida Nation*, *Taku River*, and *Mikisew* added an important element to the existing principles: federal, provincial, and local governments now have a duty to consult not only in situations where the treaty or Aboriginal right is proven, but also in cases where the right is asserted but not yet proven. The Supreme Court decision in *Mikisew* is particularly relevant to Ontario since it involved treaty rights on off-reserve “traditional” or “surrendered” lands.¹⁰

The duty to consult and accommodate is extremely important. It offers the real prospect of reconciling Aboriginal rights and interests in land, water, and resources by promoting peaceful, meaningful consultation and participation in

decision-making with respect to natural resources. Thus, the duty to consult and accommodate, if properly and effectively fulfilled, offers the very real potential to significantly reduce the number of Aboriginal occupations and protests. Equally important, the duty to consult and accommodate offers the very real potential to promote Aboriginal economies and economic self-sufficiency.

It is important to note that the duty to consult and accommodate does not give Aboriginal peoples a veto over development on their traditional lands. The Supreme Court has made it very clear, however, that governments must take a new approach in their dealings with Aboriginal peoples. The scope of the duty to consult and accommodate is potentially very wide. It is triggered in all circumstances where the province has actual or constructive knowledge of an Aboriginal right, treaty, land, or title claim, and where it is considering actions that might impact on those rights, claims, or titles. Such circumstances could include the following:

- Changes in natural resource-related and environmental regulations and policies
- The management and sale of Crown lands
- Mining applications, permits, and approvals, as well as mining activities on traditional lands
- The creation of new provincial parks or the alteration of existing parks
- Land development or industrial projects which will alter the habitat
- Land use approvals issued under provincial planning legislation, including decisions by provincial conservation authorities which might affect watersheds in areas used by Aboriginal people
- Forest management planning
- Energy-related development

This is only a partial list. It is important to note that municipal governments and provincial agencies are probably likewise subject to the duty to consult and accommodate.

5.3.2 Kitchenuhmaykoosib Inninuwug First Nation and Platinex

The confrontation between the Kitchenuhmaykoosib Inninuwug First Nation (KI First Nation) and the Platinex mining exploration company at Big Trout Lake in Northern Ontario in early 2006 dramatically illustrates what happens when the provincial government fails to take the lead in ensuring meaningful consultation

with a First Nation before it permits resource development to go ahead on traditional First Nations lands.¹¹ It also demonstrates the need for provincial leadership in the face of the competing interests of Aboriginal peoples and non-Aboriginal private enterprise and illustrates the potential for increasingly intrusive court intervention in natural resource regulation and development.

Platinex had been granted rights by the Ontario Ministry of Northern Development and Mines to undertake exploratory drilling for platinum on the traditional lands of the KI First Nation, close to its reserve, at a time when the KI First Nation was pursuing a Treaty Land Entitlement claim with the federal government.¹² The KI First Nation claims that their 85-square-mile reserve falls approximately 200 square miles short of the reserve lands to which they are entitled under the terms of Treaty 9. Although the KI First Nation is not opposed to development on its traditional lands, the community fears that if exploration is allowed to proceed, the area in question could be thereby removed from land that might be added to their reserve.

In 2004 and 2005, Platinex had several meetings with the KI First Nation chief and other members of the band, but they did not reach a development agreement. In January 2006, Platinex cancelled a meeting at which it was to hear the concerns of KI First Nation band members. In February, the company sent a drilling team to Big Trout Lake by winter road. Fifteen to twenty KI First Nation members stood on the road, blocking the truck carrying the drill, and they ploughed snow onto the airstrip used by the drilling crew. OPP officers were present throughout the confrontation. The officers took the position that without a court order or injunction, they would not remove the blockade or prevent the deposit of snow on the airstrip. Subsequently, Platinex and the KI First Nation initiated lawsuits against one another and both sought injunctions from the Superior Court; Platinex to stop the blockade and interference with the airstrip, and the KI First Nation to stop the drilling.

Mr. Justice G.P. Smith of the Superior Court heard the case in June and rendered his decision on July 27, 2006. The judge granted the injunction requested by the KI First Nation and ordered Platinex to cease its exploration program at Big Trout Lake for a period of five months, after which the parties would attend before him to discuss the continuation of his order. Justice Smith based his judgment on the principles of the honour of the Crown and the duty to consult, set out in the Supreme Court cases I have cited. He noted that the Ontario government “has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex.” He commented further:

Despite repeated judicial messages delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation.

One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.

In weighing the merits of granting injunctions to Platinex or to the KI First Nation, Justice Smith concluded that, although suspending the Platinex drilling operation would damage the business interests of the company, granting an injunction to Platinex "would make the duties owed by the Crown and third parties meaningless and send a message to other resource development companies that they can simply ignore Aboriginal concerns." By contrast, granting an injunction to the First Nation "enhances the public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably."

The confrontation at Big Trout Lake and the judicial decision in the *Platinex* case should serve as a call to Ontario to take the initiative in meeting its obligation to ensure that meaningful, good-faith efforts are made to accommodate the interests of Aboriginal peoples and to respect their rights in the course of managing natural resource development.

5.3.3 A New Provincial Policy on the Duty to Consult and Accommodate

In light of the three Supreme Court of Canada decisions discussed above, several provincial governments have released or have committed to releasing consultation guidelines to guide ministries contemplating actions that might have an impact on Aboriginal or treaty rights.¹³ Ontario published its "New Approach to Aboriginal Affairs" in 2005, which committed the province to drafting consultation guidelines, and in June 2006, released the "Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights."¹⁴

My concern is that the draft guidelines appear to direct government ministries to decide, unilaterally, whether a particular project might have an impact on Aboriginal or treaty rights and thus trigger the duty to consult. The guidelines begin with the title, "A New Relationship with Aboriginal Peoples," but unilateral decisions by the government seem to be part of the old way of relating to Aboriginal peoples.

I have also heard from parties regarding their serious concerns about the draft consultation guidelines. They told me that the guidelines give government officials too much discretion in the consultation process, and that there is too much emphasis on the product of the consultation and not enough on the process. The lack of capacity and resources within First Nations and in government ministries, sufficient to ensure that consultation and accommodation processes are meaningful, is a further concern. There is no mention of land claims in the guidelines.

The government of British Columbia has worked with the First Nations Leadership Council to develop a new consultation policy in that province. I urge Ontario to undertake a similar effort to work with provincial Aboriginal organizations to develop consultation policies acceptable to both Aboriginal and non-Aboriginal people.

Ontario must work closely with First Nations and Métis people to come to an agreement on how the government can meet the duty to consult and accommodate. Some local consultation agreements, already in place in Ontario, may serve as useful precedents or case studies, including the Grand River Notification Agreement.¹⁵ Consultation and accommodation processes are unique to each situation, however, and must be undertaken directly with the First Nations that hold the rights and treaties involved.

In my view, developing a provincial policy on the duty to consult and accommodate would be a good place to start. Ultimately, it would be advisable to incorporate an acknowledgement of this duty in legislation, regulations, and other applicable government policies. This would promote respect and understanding for this duty throughout the provincial government. It would also promote consistency and conformity with the constitutional obligations of the province.

I further recommend that the provincial government take steps to promote respect and understanding of the duty to consult and accommodate within municipalities and relevant provincial agencies.

5.4 Sharing and Managing Natural Resources

Apart from its constitutional obligations, Ontario needs a broad approach to overcoming the past exclusion of Aboriginal peoples from resource management to help secure a better economic base and future for Aboriginal peoples, to promote successful and enduring relationships between Aboriginal peoples and non-Aboriginal peoples in Ontario, and ultimately to contribute to avoiding future Aboriginal occupations and protests.

As I have mentioned, approximately 87% of land in Ontario is owned by the

Crown. The Ontario Ministry of Natural Resources (MNR) is responsible for managing Crown lands and natural resources, including fish, wildlife, and forests.

MNR has several divisions responsible for policy development, corporate support, and delivery of a number of programs. The following programs involve the most contact with Aboriginal people:

- Fish and Wildlife
- Lands and Waters
- Parks and Protected Areas
- Forest Management
- Enforcement

Program delivery is conducted through the Field Services Division, which has about twenty-five district offices and fifteen area offices. MNR employs approximately 285 people in its Enforcement Program, including 204 Conservation Officers working in the field.¹⁶

MNR has an Aboriginal affairs unit, with a staff of twenty-three. The unit provides policy development and guidance to staff in their interactions with Aboriginal people.

Several Inquiry research papers and projects submitted by parties discussed the relationship between Aboriginal peoples and MNR. For example, the submission by the Union of Ontario Indians included numerous complaints about MNR activities, including harassment of First Nations harvesters, cancellation of Community Harvest Agreements, transfer of resource management to third-party interest groups, and barriers preventing Aboriginal people from engaging in commercial forestry. The Union submitted that these experiences and others build mistrust and cynicism towards MNR:

It is a commonly held view among First Nations people that the treaties are the basis for existing relationships. It is also a widely held belief that the treaties are the mechanism that allowed Canada and Ontario to prosper, often at the expense of First Nations. In the north, many Anishinabek believe that every truckload of logs and load of ore that leaves the territory makes them poorer and someone else richer.¹⁷

MNR advised the Inquiry that it “acknowledges that the historical policies and practices of provincial and federal governments have resulted in ongoing disenfranchisement and displacement of Aboriginal people from their land and traditional practices in Canada.”¹⁸

I have learned about a number of positive initiatives undertaken by Ontario ministries and Aboriginal peoples to share resource management. The process of working towards co-management schemes is useful in itself. During the process, Aboriginal peoples, government officials, and non-Aboriginal peoples learn from one another, learn to trust one another, and build capacity and experience. Co-management arrangements also serve to educate the public about the constitutional rights of Aboriginal peoples. They reflect the willingness of the government and of Aboriginal peoples to consult, negotiate, compromise, and arrive at solutions that work. Jean Teillet described the range of these activities:

There have been other attempts to accomplish the task of bringing Aboriginal peoples into the management of the existing natural resources regulatory regime. They are known under various names — co-management, joint management, stewardship, or partnerships. Each really stands for an institutional arrangement whereby government and Aboriginal peoples, by means of a formal agreement, set out their respective rights, powers and obligations with respect to the management of specific resources in a particular area. Such arrangements include consultation processes on matters of resource allocation and management, administrative authority and decision-making ability. Such co-management arrangements are, in essence, a form of power sharing. Final decision-making in the absence of consensus varies with each situation.¹⁹

Two examples of co-management and resource-sharing initiatives in Ontario are the Anishinabek/Ontario Resource Management Council and the Saugeen Ojibway Nations and Ontario Commercial Fishery Agreement.²⁰ Researchers and a number of parties singled out these two initiatives as positive examples.

Despite these positive developments, important criticisms of previous and existing co-management arrangements must be taken into account if and when the provincial government and Aboriginal peoples negotiate or renew these agreements. For example, I heard that these arrangements are limited in scope because Ontario is reluctant to actively engage Aboriginal people in determining treaty and Aboriginal rights to natural resources, opting instead for prosecutions and other court actions to determine the extent of the rights in question.²¹ As the Chiefs of Ontario stated in their final submission, “Ontario’s steadfast refusal to recognize the rights of First Nations guaranteed by the treaties make future confrontations likely.”²²

Another criticism I heard about co-management and resource-sharing initiatives is that in some of them, Ontario acted unilaterally or consulted with

Aboriginal peoples only very late in the process. For example, the Northern Boreal Initiative opens up huge areas of the province to potential development. It is based on the *1999 Ontario Forest Accord*, which resulted from the Ontario “Living Legacy” policy. The Living Legacy is the land use strategy for 39 million hectares of public lands and waters in the central and northern parts of the province. This area is home to many First Nations people and communities. I have heard that although Aboriginal peoples will be involved in developing the community land use plans pursuant to the Northern Boreal Initiative, they were not involved in or consulted about the *Forest Accord*. The MNR, environmentalists, and the forest industry negotiated the *Accord*.²³

I understand that some of these co-management and resource-sharing arrangements are complex in implementation, but from the Aboriginal perspective, they have failed to fulfill their initial promise. For example, Condition 34 (formerly Condition 77) of the Ontario Timber Class Environmental Assessment requires MNR to conduct negotiations with Aboriginal peoples at the local level in order to find ways of achieving a more equal participation by Aboriginal peoples in the benefits realized through forest management planning.²⁴ The criticism I heard is that, since its inception in 1994, “implementation of this condition has proven to be frustratingly elusive.”²⁵

Finally, even in co-management initiatives that government and Aboriginal peoples both see as positive, there is lingering doubt about their effectiveness. For example, with respect to the Anishinabek/Ontario Fisheries Resource Centre, the Union of Ontario Indians pointed out concerns about how much Aboriginal traditional knowledge is being incorporated into the work of the Centre and how much attention MNR actually pays to the work and findings of the Centre.²⁶

The failings of some Ontario/Aboriginal co-management and resource-sharing initiatives and the criticisms of them point to the fundamental need for the provincial government to actively develop true partnerships and undertake meaningful consultations with Aboriginal peoples in resource management and development.

Ontario should take a close look at the co-management and resource-sharing initiatives which are part of the effort to establish a new relationship with First Nations in British Columbia. In 2006 alone, the government of British Columbia and First Nations communities entered into agreements about land use, mining, forestry, tourism, economic benefits, and parks management.²⁷ These agreements include the February 2006 Central Coast and North Coast Land and Resources Management Plan (LRMP), which covers approximately 6.4 million hectares of the Central Coast and North Coast of B.C. About twenty-five First Nations participated in the LRMP consultation process, along with environmentalists, industry representatives, local governments, and others. The BC government

and First Nations will negotiate individual land use agreements within the context of the LRMP.

5.4.1 Anishinabek/Ontario Resource Management Council

The Anishinabek/Ontario Resource Management Council has earned the praise of the Union of Ontario Indians, the Chiefs of Ontario, and the provincial government. It therefore serves to demonstrate the potential of a good co-management model.

The Anishinabek Nation and the MNR signed a Memorandum of Understanding in 2000 (renewed in 2003) establishing the Anishinabek/Ontario Resource Management Council. The Council is an advisory body to the Minister of Natural Resources and the Anishinabek Nation Grand Council Chief, and its purpose is to provide a forum for First Nations and senior MNR managers to discuss natural resource management in Ontario. The Council has discussed land use planning, water management planning, conservation and enforcement, fish and wildlife management, and forestry policy.

In its submission, the province said that “structures such as those developed in cooperation at local levels or at the political organization level have also proven valuable and successful in ensuring not just transparency of decision-making but actual participation and input into decision-making,”²⁸ and that “through such initiatives, communication and transparency are improved, relationships are established, and trust, awareness and understanding are built.”²⁹

The Anishinabek/Ontario Resource Management Council appears to be working well. Indeed, in July 2006, the Union of Ontario Indians and MNR signed a Letter of Intent to create a Leadership Forum supporting the Council, which will be a joint process connected to the Council, to resolve natural resources issues and disputes.

The Chiefs of Ontario recommended that Ontario build on the positive experiences with the Council and other initiatives to expand such partnerships with First Nations throughout the province.³⁰ I am encouraged to hear that the province is making efforts to create similar forums with Grand Council Treaty #3 and the Nishnawbe Aski Nation.

5.4.2 Saugeen Ojibway Nations and Ontario Commercial Fishery Agreement

The Saugeen Ojibway Nations and Ontario Commercial Fishery Agreement pertaining to the waters around the Bruce Peninsula is another good example of how to respect Aboriginal fishing rights and promote resource-sharing and joint management of natural resources. The Agreement is also an important case study

in the volatile combination of treaty and Aboriginal rights, non-Aboriginal economic interests, and court intervention, and it highlights the overarching need for provincial leadership in the regulation of natural resources in Ontario.³¹

The Chippewas of Nawash Unceded First Nation and the Saugeen First Nation (“the Saugeen Ojibway Nation”) share traditional territory in southwestern Ontario. Members of the Saugeen First Nation have historically fished the waters around the Bruce Peninsula, both for food and to trade and sell. The Crown recognized the right of the Saugeen Ojibway Nation to these waters in the 1847 *Royal Declaration*. Nevertheless, from about the mid-1800s on, the growing numbers of non-Aboriginal fishers put increasing pressure on sturgeon and lake trout stock in these waters.³²

It was not until about 1984 that MNR began to regulate commercial fishing in Lake Huron—without consultation with the Saugeen Ojibway Nation. MNR treated the Aboriginal and non-Aboriginal fishers the same way in applying quotas and licences, despite objections from the Saugeen Ojibway Nation. The result was a greatly restricted Aboriginal fishery. As Jean Teillet pointed out, “the entire Nawash commercial harvest amounted to only one percent (1%) of the entire non-Native commercial catch.”³³

In 1989, Howard Jones and Francis Nadjiwon, two members of the Chippewas of Nawash, were charged with taking more lake trout than permitted by the First Nation’s commercial fishing licence, contrary to *Ontario Fishery Regulations*. In his April 1993 ruling, Justice David Fairgrieve dismissed all charges and concluded that the Saugeen Ojibway Nation had an Aboriginal and treaty right to fish for commercial purposes.³⁴ He held that the quota imposed by MNR in its licensing scheme infringed upon this right, and that MNR could not justify this infringement. Justice Fairgrieve was also critical of the “high-handed and adversarial stance” MNR had taken toward the constitutional rights of the Saugeen Ojibway Nation.³⁵

Both before and after *Jones and Nadjiwon*, the Saugeen Ojibway Nation approached the province to try to reach a co-management agreement concerning the commercial fishery in the waters around the Bruce Peninsula. In 1994, Ontario agreed to discuss co-management.

Despite the concerted efforts of the Saugeen Ojibway Nation to educate the public about their treaty and Aboriginal rights, the summer and early fall of 1995 was marked by protests, violence, and vocal opposition from some members of the non-Aboriginal community to the commercial fishing rights of the Saugeen Ojibway Nation. The protests and violence included a march by nearly 100 people on an Aboriginal woman who was selling fish in the Owen Sound market. Aboriginal fishing boats and nets were vandalized, a First Nation-owned fishing

tug was burned, and several members of the Saugeen Ojibway Nation were assaulted in Owen Sound.³⁶

In August of 1995, the new provincial government informed the Saugeen Ojibway Nation that it would not continue with the co-management discussions. Later, the government tried to unilaterally impose a new regulatory scheme under the *Aboriginal Communal Fishing Licence Regulations*, which the Saugeen Ojibway Nation resisted. The MNR continued to lay charges against Saugeen Ojibway Nation fishers for not adhering to the communal licenses.

In 1997, the federal government appointed a judge to mediate the dispute between MNR and the Saugeen Ojibway Nation. In June 2000, seven years after the *Jones and Nadjiwon* decision recognized the Saugeen Ojibway right to fish commercially, the provincial and federal governments and the Saugeen Ojibway Nation signed the first Fishery Agreement to manage the commercial fishery in Lake Huron and Georgian Bay around the Bruce Peninsula. In July 2005, the Agreement was renewed for a further five years, including a protocol for how the parties will work together to ensure compliance and to exchange information about the commercial fishery.³⁷

A First Nation should not have to experience what the Saugeen Ojibway Nation went through to reach a co-operative management agreement with Ontario. I recommend that the provincial government continue to work with First Nations and Aboriginal organizations in Ontario to develop co-management arrangements and resource-sharing initiatives. Partnerships of this sort, however, will require resources and capacity within First Nations, the provincial government, and any third-party organizations or stakeholder groups involved. Therefore, I further recommend that the provincial government provide financial or other support to Aboriginal organizations and third parties to develop capacity, identify best practices, and formulate strategies to promote co-management and resource-sharing.

The Union of Ontario Indians submitted that, in any government and Aboriginal initiative to improve the sharing of resource management and the revenues from resources, “the focus must be on measurable targets that bring meaningful benefit to First Nation communities whose traditional territories are being directly affected by resource extraction.”³⁸ The Union further recommended that new initiatives should be subject to independent evaluation to determine their effectiveness. I consider this proposal reasonable, and I recommend that the province commission an independent evaluation of one or more significant co-management initiatives. This will assist decision-makers on all sides of the table to learn more about what works and what does not work in this important area. The evaluation should be undertaken with the cooperation and participation of Aboriginal organizations.

Initiatives like this are fully consistent with the duty to consult and accommodate, and with the honour of the Crown, harmonious relations, and the desire to avoid violence and promote Aboriginal capacity and economic self-sufficiency.

I have focused on the regulation of natural resources and on MNR, but other provincial ministries, such as those responsible for the environment, energy and mines, Northern development, municipal affairs, transportation, and others, should also carefully examine their relationships with Aboriginal peoples to ensure that they are conducted in keeping with the honour of the Crown, the duty to consult and accommodate, and the need to encourage and support Aboriginal capacity and economic self-sufficiency.

5.5 Regulations Regarding Wildlife and Fish

If we are to move beyond the types of conflicts evident in Temagami, the Bruce Peninsula, and Burnt Church, I believe that we must respect treaty and Aboriginal rights in the regulation of natural resources. These issues can be very sensitive, and communication, open-mindedness, understanding, cooperation, and flexibility are vitally important if disputes are to be resolved before they escalate into confrontation.

5.5.1 *The Interim Enforcement Policy*

The Interim Enforcement Policy (IEP), adopted in 1991 following the Supreme Court of Canada decision in *R. v. Sparrow*,³⁹ is one of the most important policies regarding Aboriginal and treaty rights related to wildlife and fishing regulations in Ontario. The IEP was amended in 1996 and 2005 to reflect court decisions regarding rights protected by s.35 of the Constitution. The IEP was intended to be an interim measure:

By its terms, the Interim Enforcement Policy was clearly intended to be an interim measure for recognizing Aboriginal and treaty rights. The policy expressly provided for immediate negotiations with Aboriginal people across the province about the MNR's enforcement procedures. It also committed the province to enact appropriate legislation regarding Aboriginal harvesting of wildlife and fish. However, when the province enacted a new *Fish and Game Conservation Act*, neither it nor the detailed regulations under it made any reference to treaty or Aboriginal harvesting rights. Nor does the legislation make any special arrangements to protect Aboriginal harvesting.⁴⁰

The IEP guides MNR enforcement operations, particularly the enforcement discretion of MNR conservation officers. The policy states that Aboriginal people harvesting fish or wildlife for personal consumption or for social or ceremonial purposes are not required to hold the otherwise applicable Ontario licence and will not be subject to enforcement action, except in certain circumstances.

The IEP has no doubt helped to clarify the exercise of MNR discretion, and it has also reduced the number of charges brought against Aboriginal peoples by MNR.

Nevertheless, some legitimate criticisms have been levelled at the Interim Enforcement Policy, including its interim nature.⁴¹ A sixteen-year-old policy is not “interim.” In any event, it appears that the promise of the IEP has not been fulfilled. For example, the IEP states that “best efforts will be made to outline traditional harvest areas.” I have been advised that little work has been done to determine these traditional harvest areas. The IEP also calls for the establishment of a First Nations/Ontario Conservation Committee or Regional Committee. Again, I have been advised that this committee has not been established. The IEP also fails to protect harvesting intended to provide a moderate subsistence to Aboriginal people, a right that has been recognized, in various specific contexts, in a series of court decisions beginning in the early 1990s.⁴²

I recommend that the Ministry of Natural Resources work with First Nations in Ontario on ways to update and improve the Interim Enforcement Policy. This review should also include discussions on how to evaluate and monitor the implementation of the policy and on ways to improve the transparency and accountability of MNR enforcement activities.

5.5.2 The Four Point Harvesting Agreement

It is also time for a dedicated effort to resolve outstanding issues regarding Métis hunting and fishing rights. Some progress on this issue was made following the Supreme Court of Canada decision in *R. v. Powley* in 2003.⁴³ The Province of Ontario and the Métis Nation of Ontario subsequently entered into the *Four Point Harvesting Agreement*, which was intended to recognize that Métis people may exercise Aboriginal rights to hunt in their traditional territories for food. However, as Jean Teillet explained, this Agreement “yielded bitterness on all sides.”⁴⁴ The difficult and often tense negotiations leading up to the Agreement almost resulted in a large public protest by the Métis Nation of Ontario. As well, MNR and Métis people have some fundamental differences of opinion about the interpretation and scope of the Harvesting Agreement, with the result that MNR has laid charges against a number of Métis harvesters. In one of these cases, *R. v. Laurin*,

Lemieux and Lemieux, the accused and the Métis Nation of Ontario assert that the charges were laid contrary to the Harvesting Agreement. This case will likely be heard in 2007.⁴⁵

5.5.3 Prosecutions and Policy-Making

Professor Coyle and others have pointed out that, since 1990, the province has frequently resorted to prosecuting Aboriginal people rather than engaging in consultation to seek to clarify the existence and extent of treaty rights. On at least three occasions since the IEP was adopted, Ontario courts have criticized the limitation of Aboriginal harvesting opportunities and reliance by the province on prosecution related to Aboriginal constitutional rights.⁴⁶ I note that the Ontario government entered into the IEP, the Saugeen/Ojibway commercial fishing agreement, and the Métis *Four Point Harvesting Agreement* after prosecutions and court decisions which upheld Aboriginal or treaty rights to natural resources.⁴⁷

In my view, the provincial government should not rely on prosecutions to determine the scope and extent of Aboriginal rights. This is not consistent with the honour of the Crown.

5.6 Transparency and Accountability

In addition to those I have already identified, there are a number of mechanisms which will improve transparency and accountability in government decision-making in the regulation of natural resources. These efforts will help build public trust and promote informed decision-making by all parties involved in these decisions.

First, I recommend that MNR, and any other provincial ministries whose activities affect Aboriginal and treaty rights in the regulation of natural resources, should develop a statement of values that addresses their relations with Aboriginal peoples. This statement would be similar to the existing provincial Statements of Environmental Values (SEV). The SEVs include information about how the ministry will apply the Environmental Bill of Rights to ministry decisions. SEVs are posted on the Environmental Registry for public review and comment. An equivalent statement related to Aboriginal rights would contribute to government accountability.

Second, the provincial government advised the Inquiry that MNR has established a Corporate Compliance Governance Office that “promotes the principles of transparency, accountability and professionalism.” One of the key projects of this Office will be to develop a formal public complaints process with respect to the conduct of ministry inspection, investigation, and enforcement

staff. I recommend that MNR move forward with this initiative. MNR should consult Aboriginal organizations during the planning stage of this process.

Third, I have already recommended that the province and First Nations in Ontario should discuss how best to evaluate and monitor the implementation of a new Interim Enforcement Policy, including examining ways to improve transparency and accountability in MNR activities pursuant to the policy. Transparency is crucial, as it provides all parties with the information necessary to discuss issues on an equal and informed basis.

Finally, in my view, the province should apply the successful practice of keeping third-party interests informed of the progress of land claim negotiations when developing Aboriginal-specific initiatives on natural resources. The Ontario Secretariat for Aboriginal Affairs ensures that third parties are given an opportunity to voice their concerns as land claims negotiations proceed. Community consultation with third parties is thus an important process in enhancing accountability and promoting settlements that strengthen relationships between First Nation communities and their non-Aboriginal neighbours. Accordingly, I recommend that the province develop and circulate a policy outlining how it will notify interested third parties of natural resource initiatives involving Aboriginal peoples.

Recommendations

14. The provincial government should work with First Nations and Métis organizations to develop policies regarding how the government can meet its duty to consult and accommodate. The duty to consult and accommodate should eventually be incorporated into provincial legislation, regulations, and other relevant government policies as appropriate.
15. The provincial government should promote respect and understanding of the duty to consult and accommodate within relevant provincial agencies and Ontario municipalities.
16. The provincial government should continue to work with Aboriginal organizations in Ontario to develop co-management arrangements and resource-sharing initiatives. The provincial government should also provide financial or other support to Aboriginal organizations and third parties to develop capacity, identify best practices, and formulate strategies to promote co-management and resource-sharing.

17. The provincial government should commission an independent evaluation of one or more significant co-management initiatives. This evaluation should be undertaken with the cooperation and participation of Aboriginal organizations.
18. The Ministry of Natural Resources and First Nations should work together to update and improve the Interim Enforcement Policy. This process should include discussions on how to evaluate and monitor the implementation of the policy and on how to improve the transparency and accountability of MNR enforcement activities.
19. The Ministry of Natural Resources and other provincial ministries whose activities in the regulation of natural resources affect Aboriginal and treaty rights should develop and circulate a Statement of Aboriginal Values which addresses their relations with Aboriginal peoples.
20. The Ministry of Natural Resources should establish a public complaints process.
21. The provincial government should develop and circulate a policy outlining how it will notify and consult with interested third parties on natural resource initiatives involving Aboriginal peoples.

Endnotes

- 1 Chiefs of Ontario Part 2 submission, para. 65.
- 2 Michael Coyle, "Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future" (Inquiry research paper), p. 22.
- 3 Jean Teillet, "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario" (Inquiry research paper), p. 6.
- 4 Nishnawbe-Aski Police Services Board, "Confrontations over Resources Development" (Inquiry research paper), pp. 41-3. Constance Lake First Nation is located approximately 30 kilometres northwest of Hearst, Ontario.
- 5 See for example Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), p. 117. Professor Macklem states that, with respect to Treaty 9, "the historical record supports the conclusion that Aboriginal signatories thought that treaty lands outside of their reserve would be shared."
- 6 Ontario. *Ontario's New Approach to Aboriginal Affairs* (Toronto: Queen's Printer of Ontario, Spring 2005), p. 1.
- 7 Anne Marie Gutierrez (Ministry of Natural Resources and Ministry of the Attorney General, Ontario) with assistance from Yves Prevost, "The Management of Natural Resources and Aboriginal Engagement in Ontario." Paper presented to Canadian Aboriginal Law Conference, October 4-5, 2006 (on file with the Inquiry).
- 8 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.
- 9 See for example *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 64; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168.
- 10 *Mikisew* involved the federal government's plan to build a winter road through Wood Buffalo National Park in northern Alberta on off-reserve lands on which the Aboriginal signatories of Treaty 8 were promised they could continue to hunt, fish, and trap, except on such tracts as might be "taken up" for government purposes. The court ruled that, before going ahead with the road, the government must work with the Mikisew Cree to try to ensure that the road did not adversely affect their traditional harvesting rights. Treaties 3, 5, and 9, the numbered treaties covering Northern Ontario, include a provision identical to the one in *Mikisew*. The other Ontario treaties have similar clauses or were made with similar verbal undertakings.
- 11 For a more detailed exploration of the KI situation, see Nishnawbe-Aski Police Services Board, pp. 44-7.
- 12 My discussion of this case is based on Justice G.P. Smith's Reasons for Judgment in *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation, et al.* Released July 25, 2006, (not yet reported). The quotations are from paragraphs 93, 96 and 97, 111, and 112 respectively.
- 13 Alberta, Manitoba, and Quebec have released draft consultation policies, guidelines, or discussion papers for input. British Columbia, Saskatchewan, Nova Scotia, and New Brunswick have committed to developing consultation policies.
- 14 Ontario Secretariat for Aboriginal Affairs, "Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights" <<http://www.nativeaffairs.jus.gov.on.ca/english/news/draftconsult.html>>.
- 15 Indian and Northern Affairs Canada, "Background to the Grand River Notification Agreement"

http://www.ainc-inac.gc.ca/on/grndbkr_e.html): “In essence the signatories agree that for a five-year period (which can be extended), they will notify each other about any contemplated action that might have a significant effect on the physical environment.” The Agreement is specific about the nature of such actions, and the parties notified have the opportunity to consider the potential impact of any activity and whether to participate in a formal consultation or review process. The signatories are the federal and Ontario governments, the Six Nations of the Grand River, the Mississaugas of the New Credit, the County of Brant, the Regional Municipality of Haldimand-Norfolk, the City of Brantford, the Towns of Dunnville, Haldimand, and Paris, the Townships of Brantford, Onondaga, and South Dumfries (now under the County of Brant), and the Grand River Conservation Authority.

- 16 Province of Ontario, Ministry of Natural Resources, “Questions Regarding the Ministry of Natural Resources” (Inquiry project), p. 2.
- 17 The Union of Ontario Indians, “Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario” (Inquiry project), p. 20.
- 18 Province of Ontario, Ministry of Natural Resources, “The Regulatory Role of The Ontario Ministry of Natural Resources and the Ministry’s Relations with Aboriginal People” (Inquiry project), p. 5.
- 19 Teillet, p. 49.
- 20 Some examples of co-management or resource-sharing agreements: the Anishinabek/Ontario Fisheries Resource Centre; the Anishnabek/Ontario Resource Management Council; co-management of certain parts of provincial parks, such as at Quetico Provincial Park and Petroglyphs Provincial Park; Condition 34 (formerly Condition 77) of the Ministry of Natural Resources Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario (Declaration Order MNR-71); the Four Point Harvesting Agreement between the Métis Nation of Ontario and the Ministry of Natural Resources; the Interim Hunting Agreement between the Algonquins of Golden Lake and Ontario; the Northern Boreal Initiative; the Wendaban Stewardship Authority; the Wikwemikong Community Forestry Management Agreement; and the Windigo Planning Board in northwestern Ontario.
- 21 Coyle, p. 67: “Unfortunately for the relationship of the parties, it appears that since 1990 the province has frequently resorted to prosecutions of Aboriginal people rather than consultation in seeking to clarify the existence and extent of treaty rights.”
- 22 Chiefs of Ontario Part 2 submission, para. 61.
- 23 Teillet, pp. 50-1.
- 24 Ontario Ministry of the Environment, http://www.ene.gov.on.ca/envision/env_reg/er/documents/2003/RA03E0004.pdf. Condition 34 reads as follows:

During the term of this approval, MNR District Managers shall conduct negotiations at the local level with Aboriginal peoples whose communities are situated in a management unit, in order to identify and implement ways of achieving a more equal participation by Aboriginal peoples in the benefits provided through forest management planning. These negotiations will include but are not limited to the following matters:

- (a) providing job opportunities and income associated with forest and mill operations in the vicinity of Aboriginal communities;
- (b) supplying wood to wood processing facilities such as sawmills in Aboriginal communities;
- (c) facilitation of Aboriginal third-party licence negotiations with existing licensees where opportunities exist;
- (d) providing forest resource licences to Aboriginal people where unallocated Crown timber exists close to reserves;
- (e) development of programs to provide jobs, training and income for Aboriginal people in forest management operations through joint projects with Indian and Northern Affairs Canada; and

- (f) other forest resources that may be affected by forest management or which can be addressed in the forest management planning process as provided for in Condition 23(c).

MNR shall report on the progress of these on-going negotiations district-by-district in the Provincial Annual Report on Forest Management that will be submitted to the Legislature.

- 25 The Union of Ontario Indians, p.19. See also pp. 17-9 for a more detailed discussion of Condition 34. See also Nishnawbe-Aski Police Services Board, pp. 17-9, and Coyle, pp. 70-2.
- 26 Ibid., p. 21. The Anishinabek/Ontario Fisheries Resource Centre was created to act as “an independent source of information on fisheries assessment, conservation and management, promoting the value of both western science and traditional ecological knowledge.”
- 27 For example, the agreement between BC and the ‘Namgis First Nation to collaboratively manage parks and protected areas within ‘Namgis traditional territory; the Economic Benefits Agreement between BC and the Blueberry River First Nations; the agreement between BC and the Osoyoos Indian Band that sets out a revenue-sharing framework for the development of Crown lands within the band’s traditional territory; the agreement between BC and the Upper Similkameen Indian Band concerning consultation before any mining activity is conducted in the band’s traditional territory; the agreement between BC and the McLeod Lake Indian Band to bolster Aboriginal access to timber resources and to help combat the mountain pine beetle infestation (this agreement is one of over 100 similar agreements with First Nations).
- 28 Province of Ontario Part 2 submission, para. 29.
- 29 Ibid., para. 16.
- 30 Chiefs of Ontario Part 2 submission, recommendation D.4.
- 31 The Chippewas of Nawash Unceded First Nation, “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash” (Inquiry project). This paper provides a detailed account of this history.
- 32 Ibid., p. 38.
- 33 Teillet, p. 53.
- 34 *R v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.).
- 35 Ibid., p. 208.
- 36 Teillet, pp. 41-3 and 55.
- 37 Ibid., p. 56.
- 38 The Union of Ontario Indians, p. 33.
- 39 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- 40 Coyle, p. 66.
- 41 See for example The Union of Ontario Indians, pp. 28-9.
- 42 Coyle, p. 67.
- 43 *R. v. Powley* [2003] 2 S.C.R. 207.
- 44 Teillet, p. 57.
- 45 For a detailed discussion of this issue, see Nishnawbe-Aski Police Services Board, pp. 56-8.
- 46 Coyle, p. 67.
- 47 *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182. (Prov. Div.); *R. v. Powley* [2003] 2 S.C.R. 207.

ABORIGINAL BURIAL AND HERITAGE SITES

Burial practices touch the fundamental personal, cultural, religious, and philosophical ideas and beliefs of both Aboriginal and non-Aboriginal peoples.

Two of the most prominent Aboriginal occupations in recent history, Oka and Ipperwash, have to differing degrees involved Aboriginal burial sites. These incidents have also been the most violent: Sûreté du Québec Corporal Marcel Lemay died at Oka and Dudley George died at Ipperwash. This is not to suggest that protests about Aboriginal burial sites are necessarily more violent than other kinds of Aboriginal protests. However, the violence at these incidents underscores the importance of this issue to Aboriginal peoples and its relevance to my mandate to “make recommendations to prevent violence in similar circumstances.”

The legal regime governing Aboriginal burial sites is more complex than most Ontarians probably realize: Any analysis of the legal protections for these sites must also consider the relationship between the laws protecting the sites themselves and the laws governing planning, development, and the environment generally. The roles of the provincial, federal, and municipal governments, planning agencies, private developers, and archaeologists must also be considered. Finally, different issues related to Aboriginal burial sites arise depending on whether the site is located on public or private land or whether it is on a First Nation reserve or within the First Nations’ traditional territory.

As is the case with many other issues, Aboriginal burial and heritage sites seem to raise intractable conflicts between the Aboriginal and non-Aboriginal world-views, and between the value accorded to history and the more practical or economic demands of contemporary society. Nevertheless, First Nations, provincial policy-makers, municipalities, and private developers have achieved important precedents and understandings about how best to balance competing interests.

It appears that pressure related to this issue may be building. More confrontations are foreseeable if we do not act quickly and thoughtfully. In my view, the best way to avoid Aboriginal occupations regarding Aboriginal burial and heritage sites is to engage Aboriginal peoples in the decision-making process. This kind of participation is consistent with the honour of the Crown and with the general themes of this report. It will also help promote economic development in this province by reducing the possibility that public and private projects will be disrupted by occupations or protests.

Aboriginal consultation and participation in decision-making is key.¹ But

meaningful, constructive participation necessarily depends on accountability and transparency in decision-making. The laws and policies governing Aboriginal burial and heritage sites must acknowledge the uniqueness of these sites, ensure that First Nations are aware of decisions affecting them, and promote First Nations participation in decision-making.

Clearer rules and expectations regarding how to address Aboriginal burial and heritage sites will benefit all Ontarians, not First Nations only. The Ontario Home Builders' Association, for example, advised the Inquiry that its members are looking for clarity, fairness, and equity in the process related to archaeological, burial, and other sacred sites.² The association recommended that the provincial government take the lead role in designing a process that balances the desire to protect and preserve archaeological and cultural heritage with the rights of landowners to develop their property.

6.1 The History of Aboriginal Burial and Heritage Sites

An understanding of history, origin stories, and the unique connection Aboriginal peoples have to the land and to the burial sites of their ancestors is key to understanding why Aboriginal people are willing to take to the barricades in order to protect these sites.

Professor Darlene Johnston discussed the relationship between the living and the dead in Anishnaabeg culture in her background paper for the Inquiry:³

In Anishnaabeg culture, there is an ongoing relationship between the Dead and the Living; between Ancestors and Descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.⁴

...

This notion of the souls of bones is key to understanding both the reverence with which human remains are treated after death and the abhorrence of grave disturbance which persists among the Anishnaabeg. Many Euro-Canadians miss the redundancy in the expression "sacred Indian burial ground." How could burial grounds not be sacred if they contain the Body-Souls of one's ancestors?⁵

This view of the ongoing relationship between the living and the dead was echoed by the Chippewas of Nawash Unceded First Nation in their report for the Inquiry:

It is important to understand how First Nation peoples view burial grounds. To us, our ancestors are alive and they come and sit with us when we drum and sing. We did not bury them in coffins, so they became inseparable from the soil. They are literally and spiritually, part of the earth that is so a part of us. That is one reason why we have such a strong feeling for the land of our traditional territories—our ancestors are everywhere. It is a sacrilege to disturb even the soil of a burial ground. It is an outrage to disturb, in any way, actual remains.⁶

Professor Johnston also described the importance to the Anishnaabeg of *Manitous* and their dwelling places.⁷ As recounted in her paper, Elder Clifford George shared his oral tradition concerning the connection between *Manitous*, medicine, and the Anishnaabeg at a community meeting organized by the Inquiry:

I was born here [at Aazhoodena]. I was overseas [fighting with the Canadian Army in World War II] when they [the federal government] took this land over.... It was desecrated when I came home. [Details regarding the Army base treatment of the reserve's cemeteries.] My father taught me that everywhere you see an apple tree people lived there at one time, died and were buried there.

At Aazhoodena there is a bottomless lake, which is cone shaped, and empties into Lake Huron. I know this lake is connected with Lake Huron because as a boy I saw a loon dive under and come out on the other lake. Michi-Ginebik [the Great Serpent] used to come into the lake and visit the people. He was friendly and brought medicine to the Anishnaabeg. When the serpent surfaced in the lake, he circled and created a whirlpool. Then he would come up on shore and begin sunning himself. There he talked to the people. Wherever he twitched, there was medicine to pick and people were cured.

But the channel is plugged up now, filled with nerve gas canisters that the Army dumped in there.⁸

Professor Johnston wrote that “patterns of disrespect and desecration” began as soon as European missionaries arrived in the New World. They disturbed the burial sites of Aboriginal peoples, desecrated sacred sites, and destroyed out-

right the dwelling places of *Manitous*. Professor Johnston concluded: “It is not surprising that, as a result of such deliberate desecration, Aboriginal peoples of the Great Lakes became reluctant to reveal their sacred places to the newcomers.”⁹

As the years went on and more and more European settlers arrived in the New World, the Crown and First Nations entered into treaties. These treaties created Indian reserves, and Aboriginal peoples lost effective control of huge tracts of their traditional lands. As Professor Johnston pointed out, however, maintaining proximity to ancestral burial grounds proved to be one of the strongest territorial attachments. As a result, the reserves retained were typically in the vicinity of established villages, fishing grounds, and burial grounds. Nevertheless, Aboriginal peoples could not, through the treaty-making process, protect all of the sites that today we call Aboriginal heritage sites:

While maintaining a toehold within the boundaries of their traditional territories, however, First Nations in Ontario were prevailed upon to surrender 99% of their lands. Village lands and sacred places did not always coincide. The huge disparity between retained and surrendered lands meant that not all sacred sites could be protected by reserve status. Perhaps the chiefs who signed the treaties believed that their people could continue to be custodians of the surrendered sacred lands. If so, they would be sorely disappointed by post-Confederation encroachments upon their authority.¹⁰

6.2 Why Aboriginal Burial and Heritage Sites Become Flashpoints

Aboriginal heritage and burial sites become flashpoints for an occupation or protest when Aboriginal peoples believe that they must occupy a site to protect it from further desecration. This often happens when a public or private landowner or developer refuses to acknowledge an Aboriginal burial place or heritage site or refuses to consult with Aboriginal peoples about the disposition of the site. This is what happened at Oka.

Many of the parties to the Inquiry commented on the burial sites issue in their final submissions, including the Estate of Dudley George and George Family Group, the Residents of Aazhoodena, Aazhoodena and George Family Group, and the Chiefs of Ontario.

The following excerpt is from the submission by the Estate of Dudley George and George Family Group:

The Anishnaabeg belief is that the souls of their departed ancestors are attached to their bones. As such, Anishnaabeg treat the bones of their

ancestors with great reverence, and abhor the disturbance of graves. This has been their way since time immemorial, and will be their way evermore. This explains why the Chief and Council made a point of asking that the burial ground in Ipperwash Park be fenced off and preserved when it was discovered in 1937. It is also half the reason why the Stony Pointers occupied the Park in September 1995 — to reclaim the burial grounds of their ancestors that had been desecrated.¹¹

Robert Antone summarized the view of many Aboriginal witnesses about the importance of the burial site at Ipperwash Provincial Park:

Society doesn't have much respect for ... our people who are living, let alone our people who have died ... and are buried ... I mean, the whole incident in Oka, they were planning on bulldozing the graveyard there ... and extending their golf course—that's what the whole incident was about ... They wanted to turn the grave yard into a golf course ... [and] when you have a society that has that much disrespect for our people ... what do you expect? ... I know that the area [Ipperwash Provincial Park] was always viewed as a burial ground and ... a sacred area. So, it didn't surprise me ... when they did occupy it.¹²

The events at Oka, Quebec in 1990 are perhaps the best-known example of what can happen when an Aboriginal burial or heritage site is threatened. The municipality of Oka planned to expand a golf course into the traditional territory of the Mohawks of Kanasatake. The land involved in the expansion was the site of an Aboriginal burial ground. The Mohawks occupied the Pines, part of the Kanesatake forest site slated for the golf course development. The occupation lasted seventy-eight days. Sûreté du Québec Corporal Marcel Lemay died during a failed attempt by police to remove the blockade.

In 1997, the federal government purchased the land at the centre of the 1990 Oka occupation and turned it over to the Mohawks for expansion of their burial ground. While this piece of land was but a small part of the Mohawks' much larger land claim, it nevertheless had both practical and symbolic importance.¹³

Oka and Ipperwash are by no means the only examples of controversies over Aboriginal burial sites: In 1992, the Chippewas of Nawash Unceded First Nation occupied unceded land within the city limits of Owen Sound to protest the desecration of an ancestral burial site located there. This land had been set aside as a reserve in the Treaty of 1857. The federal Crown or government held title to this land for the use and benefit of the Chippewas of Nawash. However, successive governments, federal and municipal, ignored the reserve nature of the land and the

presence of the burial ground. Many years later, a private developer built two houses on the site. The Chippewas of Nawash occupied the site peacefully for a week. A settlement was concluded quickly once the parties began to negotiate. The federal government eventually compensated the homeowners, the houses were removed from the burial site, and the site was re-consecrated. Even though it occurred more than a decade ago, the pain this incident caused the Chippewas of Nawash community is still evident today.¹⁴

Oka and Ipperwash are the two most prominent examples involving Aboriginal burial or heritage sites. There have been many others in Ontario: Milroy, Seaton, Teston Road, Staines Road, Boyd Park, Hunters' Point, the Red Hill Creek Expressway, Dreamers' Rock, Skandatut, Mantle site, Archie Little 2 site, Tabor Hill, the Huron-Wendat site in Town of Midland, Petroglyphs Provincial Park, and Serpent Mounds.¹⁵

6.3 Location and Nature of Aboriginal Burial Sites

People have lived in what is now Ontario for at least 11,000 years. The European presence is relatively recent, dating back about 400 years. Thus, the “post-contact” period represents less than 4% of the human history of this province. Aboriginal peoples lived throughout the region for many thousands of years prior to European contact, and so the archaeological heritage of Ontario is overwhelmingly Aboriginal.

Today, the provincial government owns approximately 87% of the land in Ontario. Approximately 12% is privately owned. First Nations reserve land and federally owned lands such as national parks make up the remaining 1%.¹⁶ Not surprisingly, most Aboriginal burial and heritage sites are located on lands outside reserve boundaries.

Unlike most Christian cemeteries, Aboriginal burial sites and practices take countless forms, depending on the culture and history of the First Nation, the practices associated with particular eras, and the geography of the region. Moreover, there are “often very few visible clues that signal” an Aboriginal burial or sacred site.¹⁷ This means that Aboriginal burial sites are often discovered (at least by non-Aboriginals) during development or construction projects. For example, one particularly important form of Aboriginal burial site in Ontario is the ossuary. This form of burial practice appears to have become common among many Aboriginal peoples in the Ontario region in the period after A.D. 700. The Founding First Nations Circle advised the Inquiry regarding these sites:

Ossuaries are essentially invisible in the modern landscape. Most of the

ossuaries known to archaeologists were first discovered as a result of land clearance in the nineteenth century. The locations of these sites may or may not be well-documented. Modern discoveries of ossuaries are generally accidental results of large-scale earth moving or other construction activities.¹⁸

Burial sites may be found in settlements or in isolated locations.

It is even more difficult to identify other kinds of sites that are sacred to Aboriginal peoples. All peoples assign special meaning to the burial sites of their ancestors, but what is considered “sacred” beyond that varies considerably between cultures. There is no universal definition of sacredness. The Chiefs of Ontario advised the Inquiry that for First Nations, sacredness involves more than burial sites:

Our relationship to the land defines who we are; we are the caretakers of Mother Earth. What is sacred then is more than a single burial location. The location of medicines, ceremonies, stories, burial sites, traditional harvesting and hunting grounds, villages and trading areas are all locations that are “sacred”. The locations of these sites are living; they are not “artefacts” relegated to antiquity. As well, instruments created to celebrate stories and ceremonies, protect medicines and honour our ancestors are sacred.¹⁹

The Chiefs of Ontario further advised the Inquiry that simple or general definitions of sacred sites were inappropriate because “the definition of what is ‘sacred’ is determined by the First Nation community itself and [is] reflective of the community’s values of what is sacred.”²⁰ The Chiefs of Ontario also rejected

the creation of an “inventory” of sacred sites. Any attempt to do so would in our view, not only serve to draw attention to areas that ought not be exposed and brought to the attention of the larger public and thereby put these areas at real risk of exploitation, but may have the illusory affect of placing limits on the number of areas to be included in such an inventory.²¹

This is not to say that Aboriginal burial and heritage sites cannot be identified. Nor it is to say that sites can only be identified after construction or developments have disturbed them. On the contrary, experience has shown that Aboriginal burial and heritage sites can be identified in the appropriate circumstances if

First Nations are actively and meaningfully involved in the planning or development process. Traditional knowledge is the most important source of information about the location or nature of Aboriginal burial and heritage sites currently used or used in living memory. For older sites, archaeology is an important supplement to traditional beliefs and understandings.²²

6.4 Destruction and Protection of Aboriginal Burial and Heritage Sites

At our December 9, 2005 consultation, Professor Ron Williamson, principal of Archaeological Services Inc., the largest archaeological firm in Ontario, commented on the protection of heritage sites:

The provincial archaeological conservation legislative mandate has been one of an unqualified success at destroying these valuable heritage legacies through excavation, and an unqualified disaster at protecting them.²³

It is possible that 8,000 heritage sites were destroyed in the Regional Municipalities of Halton, Durham, Peel, and York between 1951 and 1991, most of them before 1971. It has been reported that approximately 25% of these sites represented significant archaeological resources, which merited some degree of archaeological investigation because they could have contributed meaningfully to our understanding of the past, or warranted outright protection because they were culturally significant places for the First Nation descendants of the people who created them.²⁴

A particularly significant instance of the desecration of an Aboriginal burial site occurred at what is now known as the Staines Road ossuary. In 2001, the remains of about 308 Aboriginal people were discovered on land slated for a subdivision development in Toronto. Tests on the human remains dated them to between A.D. 1030 and 1270. An investigation determined that the human remains were from an ossuary. From the marks on the remains, it appeared that they had been damaged by heavy machinery. The remains had been buried in a pile of soil fill and garbage. The police investigated, but no charges were laid. The remains were eventually reburied on the Staines Road property where they were originally discovered.

There has been a “marked reduction” in the rate of destruction of archaeological sites throughout much of the province. Certain municipalities have adopted “progressive planning policies” concerning the conservation of archaeological sites. Yet the potential for loss in the future remains great because of “continued

growth and development” particularly in Southern Ontario, where there is the most development.²⁵

During the Inquiry, I learned of many positive developments in the protection of Aboriginal burial and heritage sites. For example, archaeological studies are now routine on many development projects in Ontario. In 2004, licensed archaeologists undertook over 1,400 archaeological projects in the province and reported over 800 archaeological sites.²⁶

I have also learned of many constructive efforts by provincial and local officials to work with First Nations and private developers to protect sites. An important example of these efforts was presented at the Inquiry’s December 8, 2005 consultation on this issue.

Fred Flood, the chief administrative officer of the Town of Midland, explained that in 2003, town workers accidentally disturbed an Aboriginal ossuary in the course of enlarging a recreation centre.

Upon the discovery of the human remains, the town ceased work immediately and contacted the Coroner, the police, the Registrar of Cemeteries, and the closest First Nation. The town followed the direction of an Elder, who provided guidance and training to those involved. The town hired security guards to protect the site and archeologists to assess the site. The town paid to have the remains removed and stored until the site could be stabilized. The Registrar of Cemeteries declared the site an Aboriginal peoples’ cemetery.

Throughout this process, the town worked closely with a number of First Nations, including the Huron-Wendat, known to have been prominent in Southern Ontario but now living in Quebec, whose ancestors were buried at the site.

In the fall of 2003, the town supported the First Nations in the reburial ceremony. In consultation with the First Nations, the town landscaped the area and erected a commemorative stone.

Another positive example is the protection of what is now called the Teston Road ossuary. A Huron-Wendat ossuary in the York Region of Ontario was disturbed in 2005 during the widening of Teston Road. Archaeologists estimated that the human remains found were 300 to 700 years old. Over 200 people had been buried in this ossuary. After consultation with the Huron-Wendat and other First Nations communities, York Region agreed to alter the planned course of the road to avoid disturbing the ossuary further.

These examples, and others, highlight the principles I discuss in this chapter, including respect for Aboriginal values and meaningful consultation with Aboriginal communities. They also prove that Aboriginal burial and heritage site issues can be addressed in a peaceful, cooperative, and constructive manner if parties work together.

It is also important to keep in mind the scope of this issue. Notwithstanding the examples discussed so far, it is rare for a property owner to uncover an Aboriginal burial site. Between 1992 and 2005, only forty-eight Aboriginal burial sites were reported and investigated under the *Cemeteries Act*. Compared with the more than 10,000 archaeological assessments carried out during the same period, the likelihood that a developer will encounter an Aboriginal burial site is extremely low.²⁷ That said, the rarity of uncovering these sites does not diminish the emotional impact on the people whose ancestors are buried on the property.

6.5 Provincial Legislation

There are several provincial statutes that directly or indirectly affect Aboriginal archeological sites, including Aboriginal burial and heritage sites. My analysis of the laws, policies, and guidelines governing these sites has led me to several observations:

- The provincial government has made important progress on incorporating Aboriginal values and protecting Aboriginal burial and heritage sites in several areas. Nevertheless, I believe that Aboriginal burial and heritage sites on Crown lands can and should be protected still more effectively.
- There have been many constructive efforts to define the scope of the provincial duty to consult with Aboriginal peoples on these issues, but there remains a need for greater clarity and consistency.
- Accountability and transparency for decisions affecting Aboriginal burial and heritage sites needs to be improved, particularly in the case of private lands.

Perhaps not surprisingly, these observations are consistent with my earlier observations about land claims and natural resource issues. Indeed, the benefits of improved clarity, consultation, and transparency and accountability are just as important in this context as in others.

Consultation with and participation in decision-making by Aboriginal peoples should be encouraged early and often to ensure that issues regarding Aboriginal burial and heritage sites are addressed constructively and peacefully.

As a first step, I recommend that the provincial government work with First Nations and Aboriginal organizations in Ontario to develop policies which acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and

policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate. This would promote respect and understanding of these issues throughout the provincial government. It would also promote consistency and conformity in their application.

The importance of thorough and meaningful consultation is illustrated by what has happened with the Seaton lands. The Seaton lands consist of about 1,270 hectares of publicly owned land in Pickering, Ontario. These lands were likely the hunting, gathering, and fishing grounds of numerous First Nations peoples, and Aboriginal burial and heritage sites are found there.

The Ontario Ministry of Municipal Affairs and Housing and the Ontario Realty Corporation (ORC) worked together to prepare the Seaton lands for sale to private developers. The ORC conducted an environmental assessment of the Seaton lands as part of this work. The environmental assessment included consultations with First Nation communities in the area of the Seaton lands on behalf of the provincial government. The ORC issued a Notice of Completion for the environmental assessment in January 2006.

In the summer of 2006, seven First Nation communities in Ontario filed a judicial review application against the Ontario Ministry of the Environment, the ORC, and the Huron-Wendat Nation.²⁸ The application requested that the court quash the Notice of Completion of the environmental assessment. The applicants alleged that they had an inherent and direct cultural interest in the Seaton lands. The applicants maintained that the province, through its agent the ORC, failed to meet its consultation obligations. The judicial review application was heard in November 2006. A decision is expected in early 2007.

6.5.1 *The Cemeteries Act and the Funeral, Burial and Cremation Services Act, 2002*

The Ministry of Government Services has consolidated two laws, the *Cemeteries Act* and the *Funeral Directors and Establishment Act*, into the *Funeral, Burial and Cremation Services Act, 2002* (the “new Act”). The government is currently consulting interested groups and developing draft regulations. The new Act has not been proclaimed.

The main purpose of the *Cemeteries Act* and the new Act is to regulate the establishment, operations, and closing of cemeteries, and to protect consumers in their dealings with cemetery and crematorium operators. Aboriginal burial sites, with their historical and spiritual significance, do not fit comfortably within consumer protection legislation:

The Chiefs of Ontario take the position that the very term ‘cemetery’ and various provisions within the *Cemeteries Act* (such as commissioning and decommissioning) illustrate the profound difference between our understanding of our relationship with our ancestors and that of the dominant Euro-Canadian culture. This legislation in our view is wholly inadequate and cannot be relied upon as the instrument to protect a territory we would describe as ‘sacred.’²⁹

The “Burial Sites” sections of the *Cemeteries Act* and the new Act and regulations set out the procedures for dealing with Aboriginal cemeteries and burial grounds. The process relating to Aboriginal burial sites remains largely unchanged in the new Act. The *Cemeteries Act* and the new Act also outline the steps a landowner must take if a burial site is uncovered on his or her property.

A number of concerns were raised about the *Cemeteries Act* during the Inquiry. One concern was that the Registrar of Cemeteries usually contacts the First Nation community located closest to a burial site when a site is discovered. Given the history of Aboriginal peoples in what is now Ontario, the closest community is not necessarily culturally affiliated with the burial site. The Midland site mentioned above is an example. It is my understanding that the new Act or regulations will clarify that the proper representative should be the First Nation with the closest cultural affiliation to the person or persons whose remains are found on a site.

Another concern was raised about the registrar’s authority under the *Cemeteries Act* to declare that a burial site is an “unapproved aboriginal peoples cemetery” or “an irregular burial site.” The Inquiry heard that Aboriginal people consider the terms “unapproved” or “irregular” to be offensive. The provincial government has responded to this concern and proposes to use the term “aboriginal peoples burial ground” in the new Act.

A third issue involves the manner in which the *Cemeteries Act* and new Act address “approved” versus “unapproved” cemeteries. Both laws specify that an approved cemetery can only be closed (and the burials removed) by order of the registrar. The registrar may only close a cemetery if it is in the “public interest” to do so.³⁰ Closing orders can be appealed to the Licence Appeal Tribunal.³¹ However, the “public interest” test and appeal provisions do not apply to sites likely to contain Aboriginal remains.³² There is no apparent reason why persons wanting to protect Aboriginal cemeteries should not have access to the same appeal mechanisms as applies to non-Aboriginal cemeteries. The appeal process should apply to all types of cemeteries and burials, not only to “approved” cemeteries and burials.

Finally, the Inquiry heard that the *Cemeteries Act* and the new Act do not include a consideration of Aboriginal values. As a result, Aboriginal communities are often forced into the untenable position of having to prove that an area is a burial ground by disturbing the burial. Including a duty to consult with Aboriginal peoples in the legal and policy rules governing Aboriginal burial sites and a consideration of Aboriginal values would likely address this issue.

6.5.2 Provincial Legislation and Aboriginal Heritage Sites

The provincial government has made some important progress in recent years with respect to protecting Aboriginal heritage sites located on public lands. There is a nascent regulatory regime that is quite promising in its potential protection of Aboriginal heritage sites. This is an important development that offers the potential to improve the regulation of these sites and reduce the risk of confrontations. The same cannot be said of the regulatory regime governing Aboriginal heritage sites located on private lands in Ontario.

6.5.3 Aboriginal Heritage and Public Lands in Ontario

Two main laws apply to Aboriginal heritage sites uncovered on public lands: the *Public Lands Act* and the *Environmental Assessment Act*.

6.5.3.1 The Public Lands Act

The *Public Lands Act* (PLA), administered by the Ministry of Natural Resources (MNR), governs the management, sale, and disposition of the public lands and forests in Ontario.³³

There is no mention of Aboriginal burial or heritage sites, Aboriginal values, or consultation with Aboriginal peoples in the PLA or its regulations. However, a Public Land Management Directive issued by MNR includes a guiding principle to the effect that, when disposing of public lands in any way, MNR must consult with Aboriginal communities where the disposition might infringe upon an existing Aboriginal or treaty right, or where the disposition involves lands that are subject to a land claim.³⁴ While it appears that MNR makes a unilateral decision about whether a disposition of land might infringe upon an Aboriginal or treaty right, this is nevertheless a positive development, since it would presumably include consultation and dialogue with Aboriginal peoples about any heritage sites on the land in question.

In addition to the Public Land Management Directive, there are other constraints on the MNR power to dispose of public lands, including the *Environmental*

Assessment Act and the *Planning Act*. There are also special laws that apply to public lands which are also provincial parks.³⁵

6.5.3.2 *The Environmental Assessment Act*

The purpose of the *Environmental Assessment Act* (*EAA*) is the betterment of the people of Ontario by providing protection, conservation, and wise management of the environment.³⁶ The *EAA* is administered by the Ministry of the Environment. It applies to public and designated private sector projects.

The term “environment” is defined very broadly in the *EAA*. It includes “the social, economic and cultural conditions that influence the life of humans or a community,” and “any building, structure, machine or other device or thing made by humans.”³⁷ This definition would capture Aboriginal heritage sites and artifacts.

The *EAA* requires that “every proponent who wishes to proceed with an undertaking shall apply to the Minister for approval to do so.”³⁸ The application must include the proposed terms of reference and the environmental assessment, and the proponent must consult with interested persons in the preparation of these documents.³⁹

Heritage studies are routine during the environmental assessments of major undertakings. If the heritage in question is Aboriginal, then the proponent would have to consult with Aboriginal peoples about the undertaking.⁴⁰

The *EAA* permits some groups of undertakings which share an “attribute, quality or characteristic” to be approved as a “Class Environmental Assessment” (Class EA).⁴¹ The Class EA process is relevant to the protection of Aboriginal heritage on public lands because the sale and management of these lands is subject to Class EA processes.

Professor Johnston discussed a number of recent Class EA documents and other guidelines in detail.⁴² She was impressed with the number and diversity of Class EA documents and other guidelines and policies which incorporate a consideration of Aboriginal values and consultation with Aboriginal peoples in the disposition and management of public lands.

The major concern about these documents is that they often do not include definitions or explanations of what “Aboriginal values” means in the context of the public land in question. The exception is the Draft Forest Management Guide for Cultural Heritage Values, released for discussion in July 2005, which includes a constructive definition of “Aboriginal Cultural Heritage Values.”

The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of “Aboriginal values” in all Class EA documents and other guidelines and policies applicable to public lands.

Finally, the *EAA* is subject to the *Environmental Bill of Rights (EBR)*.⁴³ This means that certain types of environmental information must be posted on the Environmental Registry, including public notice of proposals, decisions, and events that could affect the environment. The public then has an opportunity to comment on proposals and projects before the government makes any final decisions. The government must take any comments from the public into consideration when deciding whether to accept the assessment and approve the undertaking. This requirement is an important part of public consultation about the environment. It is also an important accountability mechanism. It helps to ensure that government decision-making in many environmental matters, including those potentially affecting Aboriginal burial and heritage sites on public lands, is transparent.

6.5.4 *Aboriginal Heritage and Private Lands in Ontario*

The *Planning Act* and the *Ontario Heritage Act* are the two main laws applicable to Aboriginal heritage sites on private lands. As I have mentioned, Aboriginal heritage sites uncovered on private land in Ontario do not have the same level of protection as Aboriginal heritage sites uncovered on public lands do, and they are not subject to the same level of Aboriginal involvement and consultation.

6.5.4.1 *The Ontario Heritage Act*

As Professor Johnston pointed out in her paper, “Given its title, one might expect the *Ontario Heritage Act* to make explicit provisions for the protection of Aboriginal heritage resources in consultation with Aboriginal peoples. Regrettably, the Act contains references to neither.”⁴⁴ Instead, the *Ontario Heritage Act (OHA)* is largely directed at regulating the archaeological profession, not at protecting heritage sites and evaluating the appropriateness of plans to excavate them.

The legislative and regulatory regime governing the approval of alterations of heritage sites on private land is complex. The provincial Ministry of Culture administers the *OHA*. However, the ministry does not officially approve site alterations. Rather, it effectively “signs off” on the adequacy of an excavation through a process of issuing “clearance letters” to other planning authorities, particularly municipalities.

In practice, neither Aboriginal peoples nor any other members of the public generally have an opportunity to review and comment on plans to excavate an Aboriginal heritage site on private lands.

The Environmental Registry is a potential means of providing public notice of these activities. The Ministry of Culture is one of the fourteen ministries to which the *EBR* applies, subject to certain exceptions.⁴⁵ These exceptions include

the review and approval process for heritage sites. Therefore, the Ministry of Culture is under no obligation to post “instruments” or decisions on the Environmental Registry which allow excavation of archaeological sites.⁴⁶ As a result, these decisions are rarely subject to public scrutiny or comment. The ministry has occasionally posted “information” about new heritage policies on the registry. Unfortunately, it has only done so six times since 1995. In contrast, the Ministry of the Environment has posted nearly 17,000 “instruments” since 1994.⁴⁷

In my view, plans to excavate Aboriginal burial and heritage sites on private lands should be made more transparent. First Nations, Aboriginal peoples, and the public at large should have an opportunity to be notified of potential decisions affecting these sites. Posting notices or instruments on the Environmental Registry and allowing the public to comment before a final decision is made is one option. I recommend, therefore, that the provincial government, in consultation with First Nations and Aboriginal organizations, determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites in Ontario.

6.5.4.2 *The Planning Act*

The *Planning Act* (*PA*), administered by the Ministry of Municipal Affairs and Housing, sets out the rules for development in Ontario.⁴⁸ These rules apply to the development of both public and private lands.

Any individual or body with responsibilities under the *PA*, such the minister, a municipality, a local board, a planning board, or the Ontario Municipal Board, “shall have regard to” the multitude of provincial interests set out in s.2 of the *PA*. These interests include “the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest.”

The government may issue policy statements on matters of provincial interest relating to municipal planning.⁴⁹ All decisions about planning matters “shall be consistent with” the policy statements.⁵⁰

The Provincial Policy Statement (PPS), revised in March 2005, includes direction about cultural heritage and archaeology. On lands containing archaeological resources, development is only permitted if the resources have been

conserved by removal and documentation, or by preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site may be permitted.⁵¹

The PPS includes a definition of “significant” with regard to cultural heritage and archaeology: “resources that are valued for the important contribution they make to our understanding of the history of a place, an event, or a people.”⁵² In Professor Johnston’s view, the heritage provisions of the PPS have the potential to protect Aboriginal heritage:

The Cultural Heritage provisions of the PPS, if applied with appropriate sensitivity, have great scope for protecting Aboriginal heritage from the negative impacts of development. The *Planning Act* requires all planning decisions to be consistent with the mandatory conservation policy. But the question remains, who are the decision makers that are bound by this conservation mandate? It turns out that the responsibility for heritage protection is very diffuse and does not always correspond with expertise and resources.⁵³

In the past, the Ministry of Culture was much more involved in reviewing development applications under the *PA* to determine whether the property might contain heritage sites. If the possibility of a heritage site existed, the ministry attached conditions requiring an archaeological assessment and a plan to mitigate damage to the site.⁵⁴ In 1996, the *PA* was amended and many planning approval functions devolved from the ministry to municipalities. Professor Johnston explained the problems with this change in responsibility:

Critics of the devolution have challenged ‘the willingness and ability of these approval authorities to effectively address archaeological concerns.’ Very few, if any of the approval authorities have archaeologists on staff. As a result, persons lacking specialized training are required to make the crucial determination of whether lands slotted for development possess high archaeological potential. Non-specialists are required to assess “Archaeological Potential” based on screening criteria developed by the Ministry of Culture.⁵⁵

In my view, the Ministry of Culture should again assume a greater role in reviewing and approving decisions about Aboriginal heritage sites, in consultation with the appropriate Aboriginal peoples.

6.6 Archaeological Master Plans

One way to create inventories of known and potential archaeological sites is for cities, towns, and regions to develop archaeological master plans. These plans try to predict where archaeological sites might be located. Municipalities can

then call for archaeological studies prior to any development of the sites identified in the master plan. In 2005, only about ten of the 445 municipalities in Ontario had draft or final archaeological master plans. The municipalities with plans in place include the cities of Toronto and Windsor, the town of Richmond Hill, and the Region of Waterloo.⁵⁶

Archaeological master plans are only effective if they are available and they are used actively. The provincial government should therefore encourage municipalities to develop and use archaeological master plans across the province.

6.7 Public Education

There is a need for public education to support efforts to protect Aboriginal burial and heritage sites. This education should be directed at the general public, heritage enthusiasts, private landowners, and public officials whose activities may involve Aboriginal burial and heritage sites. The provincial government should prepare plain language public education materials to meet this need.

6.8 Aboriginal Burial and Heritage Site Advisory Committee

The priorities of consultation and participation outlined in this chapter highlight the need for an Aboriginal burial and heritage site advisory committee in Ontario. This committee would provide advice to the provincial government about broad issues related to Aboriginal heritage and burial sites.

The Chiefs of Ontario proposed a First Nations Burial Ground Archaeological Sites Committee. I am also aware of the Founding First Nations Circle and the work they have done as part of the plans for the Seaton lands and for Teston Road. First Nations and Aboriginal organizations should work with the provincial government to develop an appropriate committee.

Recommendations

22. The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate.

23. The provincial government should ensure that the *Funeral, Burial and Cremation Services Act, 2002* includes the same appeal process for all types of cemeteries and burials and an obligation to consider Aboriginal values if a burial site is determined to be Aboriginal.
24. The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of “Aboriginal values” in all Class EA documents and other guidelines and policies applicable to public lands.
25. The provincial government, in consultation with First Nations and Aboriginal organizations, should determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites.
26. The provincial government should encourage municipalities to develop and use archaeological master plans across the province.
27. The provincial government should prepare plain language public education materials regarding Aboriginal burial and heritage sites.
28. The provincial government should work with First Nations and Aboriginal organizations to develop an Aboriginal burial and heritage site advisory committee.

Endnotes

- 1 My approach to this issue is somewhat different from that of previous reports. The Royal Commission on Aboriginal Peoples (RCAP), for example, recommended that governments return sacred lands to Aboriginal ownership. RCAP also recommended an inventory of historical and sacred sites, legislation to ensure that Aboriginal peoples can prevent or arrest damage to these sites, and a review of legislation affecting the conservation and display of cultural artifacts to ensure that Aboriginal peoples are involved. See Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), ch. 4, “Lands and Resources,” recommendations 2.4.58, 3.6.1, and 3.6.
- 2 Comment by a representative of the Ontario Home Builders’ Association who attended the Inquiry’s December 8, 2005 consultation (on Inquiry DVD). The Ontario Home Builders’ Association represents about 4,000 residential builders, who produce over 80% of the housing stock in Ontario. See <<http://www.homesontario.com>>.
- 3 Darlene Johnston, “Respecting and Protecting the Sacred” (Inquiry research paper): “Anishnaabeg” is the term for people who speak Anishinaabemowin, so it would include Odawa, Potawatomi, Ojibway, Mississauga, and some other tribes in the United States.”
- 4 Ibid., pp. 4-5.
- 5 Ibid., p. 7.
- 6 The Chippewas of Nawash Unceded First Nation, “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash” (Inquiry project), p. 21.
- 7 Johnston, p. 8. The Anishnaabeg understand the world to be inhabited by spiritual beings known as *Manitous*. These spirits are not divinities in the Western sense of the term. They do not exist in an ethereal realm. Rather, they are associated with particular places and seasons and they are intimately engaged in the worldly existence of the Anishnaabeg.
- 8 Ibid., p. 19-29.
- 9 Ibid., p. 15.
- 10 Ibid., p. 24.
- 11 The Estate of Dudley George and Members of Dudley George’s Family submission, p. 46.
- 12 Robert Antone testimony, March 10, 2005, Transcript p. 61.
- 13 See Geoffrey York and Loreen Pinder, *People of the Pines* (Toronto: McArthur & Company, 1991) for more information about the 1990 Oka crisis.
- 14 The Chippewas of Nawash Unceded First Nation, pp 21-34.
- 15 Archie Little 2 is a fourteenth-century Iroquoian settlement located in the Rouge River watershed in Scarborough. The Boyd Park site is located in the City of Vaughan and includes a large Iroquoian village site from 1450-1550. Dreamer’s Rock is an Aboriginal spiritual site located on Birch Island in Lake Huron, near Manitoulin Island. Nochemowenaing (Hunter’s Point) is site located on Georgian Bay at Jackson’s Cove. The site is sacred to the Chippewas of Nawash Unceded First Nation and contains Aboriginal archaeological and burial sites. Mantle is an Iroquoian site from the sixteenth century located in Whitchurch-Stouffville, just north of Toronto. The site includes many longhouses. Milroy is a 170-acre parcel of land in Markham that includes the remains of a large Huron-Wendat village site and possible burial grounds. Moatfield is an ossuary and village site uncovered in North York in 1997. It is likely Iroquoian in origin. Petroglyphs Provincial Park, located northeast of Peterborough, is sacred to Aboriginal peoples. It contains the largest known concentration of Aboriginal rock carvings in Canada. The Red Hill Creek area includes Aboriginal archaeological sites in the Red Hill Creek valley area in the City of Hamilton. These sites

date from between 9000 B.C. and A.D. 1300. Serpent Mounds Park is located southeast of Peterborough on Rice Lake. It includes ancient Aboriginal burial sites.

- 16 Johnston, p. 27.
- 17 The Founding First Nations Circle (FFNC), "Aboriginal Burial and other Sacred Sites in Ontario," p. 1 (on file with the Inquiry). The impetus for establishing the Founding First Nations Circle was the Seaton land development. The Founding First Nations Circle is an informal group of people, from various First Nations that were or still are prominent in Southern Ontario, including the Huron-Wendat, Six Nations of the Grand River, and various Ojibwa First Nations of the north shore of Lake Ontario. The purpose of the Circle is to coordinate input into developments that may have an impact on Aboriginal heritage and burial sites. The Circle does not formally represent any of these First Nations or any of the Aboriginal organizations in Ontario such as the Chiefs of Ontario.
- 18 Ibid., p. 11. The Founding First Nations Circle advised the Inquiry that the term "ossuary" has been applied in a number of different ways to the mortuary customs of various northeastern North American Aboriginal groups. The term tends to be interchanged with burial pit, mixed graves, and mass burials.
- 19 Chiefs of Ontario Part 2 submission, para. 76.
- 20 Ibid., para. 76.
- 21 Ibid., para. 77.
- 22 The Founding First Nations Circle, p. 1.
- 23 Ron Williamson, comments at Inquiry's December 9, 2005 consultation (on Inquiry DVD).
- 24 Archaeological Services Inc., "Legislation," <<http://www.archaeologicalservices.on.ca/legislation.htm>> (accessed January 24, 2007). These figures include but are not limited to Aboriginal heritage sites.
- 25 The Founding First Nations Circle, p. 4.
- 26 This data is based on information provided by the Ontario Ministry of Culture at the Inquiry's December 8, 2005 consultation (on file with the Inquiry).
- 27 Johnston, pp. 62-3.
- 28 Hiawatha First Nation, Mississaugas of Alderville First Nation, Beausoleil First Nation, Chippewas of Georgina Island First Nation, Mnjikaning First Nation, Curve Lake First Nation, and Mississaugas of Scugog Island First Nation.
- 29 Chiefs of Ontario Part 2 submission, para. 85.
- 30 *Cemeteries Act*, s. 8(2) CA; s. 88(6) of the new Act.
- 31 *Cemeteries Act* s. 10 CA; s. 89 of the new Act.
- 32 These are defined as "unapproved cemeteries" and "unapproved aboriginal peoples cemeteries" in the *Cemeteries Act*, and as "burial ground" and "aboriginal peoples burial ground" in the new Act.
- 33 R.S.O. 1990, chapter P.43, s. 2(1).
- 34 Ontario. Ministry of Natural Resources. Public Land Management Directive PL 4.02.01, "Application Review and Land Disposition Process," June 7, 2005. The directive contains the following "Guiding Principle":

When disposing of right to use public land (e.g. land use permit or licence of occupation) or interests in public lands (e.g. easement, Crown lease, or sale), MNR will consult with aboriginal communities where a requested disposition may result in the infringement of an existing aboriginal or treaty right, or where a disposition involves lands that are subject to an aboriginal land claim.

- 35 For a discussion of public lands designated as provincial parks, see Johnston, pp. 34-5. The new *Provincial Parks and Conservation Reserves Act, 2006* S.O.2006, Chapter 12, once proclaimed, will include considerable scope for heritage protection in the “purposes” section of the *Act*.
- 36 R.S.O. 1990, Chapter E.18, s. 2.
- 37 *Ibid.*, s. 1(1).
- 38 *Ibid.*, s. 5(1).
- 39 *Ibid.*, ss.5(2) and s. 5.1.
- 40 See for example *R. v. Ontario Realty Corporation*, Ontario Court of Justice, May 17, 2004 (unreported). The Ontario Realty Corporation sold about 170 acres of land in Markham, Ontario (the “Milroy site”) to the Catholic Cemeteries—Archdiocese Toronto. The Milroy site contained a 500-year-old Aboriginal village site. The Catholic Church had plans to construct a 50,000-plot cemetery on the land. The sale occurred without any consultation with Aboriginal peoples. A private prosecution was launched and the Ontario Realty Corporation was found guilty of failing to conduct a proper environmental assessment before disposing of the property, contrary to s.38 of the *Environmental Assessment Act*.
- 41 *Environmental Assessment Act*, ss.1(2) and s.13.
- 42 Including: Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (Class EA-RSFD), approved December 11, 2002; Class Environmental Assessment for Provincial Parks and Conservation Reserves (Class EA-PPCR) approved September 23, 2004; Class Environmental Assessment Approval for Forest Management on Crown Lands in Ontario, approved June 25, 2003; and Draft Forest Management Guide for Cultural Heritage Values, released in July 2005.
- 43 S.O. 1993, Chapter 28, proclaimed in February 1994.
- 44 Johnston, p. 41.
- 45 O.Reg.73/94. Sections 15 and 19 to 26 are not applicable to the Ministry of Culture.
- 46 *Environmental Assessment Act*, s.1(1). The Act defines instruments as “any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act.”
- 47 See note 2.
- 48 The *Planning Act* R.S.O. Chapter P.13.
- 49 *ibid.*, s. 3.
- 50 *Ibid.*, s. 3(5)(a).
- 51 Provincial Policy Statement (2005), s. 2.6.2 (on file with the Inquiry).
- 52 *Ibid.*, s. 6.0.
- 53 Johnston, p. 44.
- 54 *Ibid.*, p. 44.
- 55 *Ibid.*, p. 45: “I don’t think we’re in Kansas anymore,” quoting Neal Ferris, “The Rise of the Archaeological Consulting Industry in Ontario” in P. Smith and D. Mitchell, eds., *Bringing Back the Past: Historical*

Perspectives on Canadian Archaeology. Mercury Series Paper 158 (Ottawa: Museum of Civilization, Archaeological Survey of Canada, 1998).

- 56 Ontario. Ministry of Culture, *Strengthening Ontario's Heritage: An introductory guide to identifying, protecting and promoting the heritage of our communities* (Queen's Printer for Ontario, 2005), p. 22.

EDUCATION ABOUT ABORIGINAL PEOPLES

The road to harmony is neither short nor fast. Harmony requires respect. Respect requires understanding. To build understanding, knowledge is necessary. That knowledge — for every one of us — can flow from public education.

(Office of the Treaty Commissioner, Saskatchewan,
Annual Report 2005-2006, p. 23)

Education is an implicit part of every public inquiry, and I have tried to promote the educational benefits of this Inquiry from the outset. The testimony of the first two witnesses at the hearings, Professor Darlene Johnston and Ms. Joan Holmes, was intended to help me, the parties to the Inquiry, and the public at large understand Aboriginal culture, traditions, and history in Ontario and particularly in the Ipperwash region. The hearings were open to the public and were soon broadcast live over the Internet. We also posted daily transcripts of the evidence. In the policy phase, the Inquiry commissioned a large number of research papers, held consultations, and supported projects undertaken by the parties. We also organized a two-day Indigenous Knowledge Forum to explore the differences between Anglo-Canadian and Aboriginal knowledge and to promote understanding of Aboriginal history and traditions. As a less well-known but equally important effort, my staff made several presentations in educational settings over the course of the Inquiry. It is my sincere hope that this Inquiry has contributed a lasting educational legacy, for all Ontarians, regarding the important issues we considered.

I began this Inquiry with a little more experience of Aboriginal peoples, customs, values and history than many non-Aboriginal Ontarians have. Nevertheless, I have learned a great deal, and the Inquiry has impressed upon me the richness and diversity of the history of Aboriginal peoples in what we now call Canada and Ontario. Very few Ontarians will ever have the benefit of this kind of educational experience. For me, it has emphasized why public education is so important. By public education, I mean education for both the public generally and education within the elementary and secondary school systems.

The Inquiry raised many contentious issues. The single issue upon which almost everyone agreed was the fundamental importance of education in

improving relations between Aboriginal and non-Aboriginal peoples. Witnesses at the hearings, the recommendations by parties, our background papers, and the participants at our roundtables and consultations all made this point.¹

Public education will help non-Aboriginal Ontarians understand the history of Aboriginal occupations and protests and the catalysts for them, as well as Aboriginal issues generally. Public education and understanding will also assist everyone, Aboriginal peoples and non-Aboriginal people alike, in participating more effectively in our democracy and in understanding and discussing Aboriginal issues more thoughtfully. Particularly in relation to treaty and Aboriginal rights, education will help people to understand why governments take certain policy positions and pass certain laws.

Ipperwash occupier Kevin Simon testified that when he attended public school, there was very little information about Aboriginal histories, treaties, or rights. He felt that the lack of knowledge of Aboriginal and treaty rights can exacerbate the racist attitudes some non-Aboriginal people have towards Aboriginal peoples. And, he drew attention to the crucial connection between education and the mandate of the Inquiry to reduce violence in similar circumstances: “I believe that with education, people would start realizing that we’re not so farfetched in our statements when we talk about our rights and freedoms.”²

In chapter 3, I identified respect for treaty and Aboriginal rights as one of the themes of this report. Respect must begin with knowledge and understanding. At the very least, every Ontarian should understand that this province and our country were built upon the treaties negotiated with our First Nations, and that everyone shares the benefits and obligations of those treaties. Every Ontarian should also realize that treaties are not historical artefacts from some distant time. They remain vitally important and relevant today.

This is not the first public inquiry to emphasize the importance of education in improving understanding, and ultimately, improving relations between Aboriginal and non-Aboriginal people:³

Public education is essential in confronting the problems posed by ignorance and misconceptions regarding our place in Canadian history and the nature of our rights. All Canadians should have the knowledge required to understand our situation, as well as the knowledge that what we have sought all along is mutual respect and coexistence.⁴

I also agree with the Mennonite Central Committee of Ontario that “education without relationships is not enough.”⁵ The Chippewas of Kettle and Stony Point First Nation made a similar point: “Only education can overcome the habits

and attitudes of a lifetime, coupled with actual and respectful interaction with Aboriginal communities and individuals.”⁶

Education and personal relationships are both essential. Both are necessary for Aboriginal and non-Aboriginal Ontarians to be able to live together in peace and harmony.

I cannot make recommendations to change people’s hearts. People of good will must commit to building personal relationships. I am confident that Aboriginal and non-Aboriginal people can and will find ways to work and live together in harmony in their communities. Some are already doing so. Members of the Mennonite Central Committee of Ontario and local Aboriginal peoples demonstrated great leadership in building relationships in the tense months and years after Ipperwash. These were not isolated efforts. At the Ipperwash community meeting organized by the Inquiry, a number of the participants spoke about their good relations with local Aboriginal peoples. One man talked about the excellent relationship he and six generations of his family before him have enjoyed with the local Aboriginal community.⁷

7.1 Education for the Public

The general public lacks the understanding about our inherent rights, and our aspiration for our future generations. There needs to be more focus on providing the general public with the necessary sources to educate themselves regarding our principles, values and future direction ... The government must commit to work with First Nations to promote effective public education regarding First Nation rights, histories and future aspirations.⁸

I agree with Ontario Regional Chief Angus Toulouse that there is a general lack of knowledge about Aboriginal and treaty rights and the constitutional protections afforded these rights. For example, I do not believe that most non-Aboriginal Ontarians appreciate that non-Aboriginal people have benefited greatly from the treaties:

Many non-natives do not understand or appreciate the economic and other benefits that they have received as a result of treaties between their nation and First Nations, and what First Nations have lost — either because they agreed to give it up in treaties or because of breaches of those treaties. A deeper public understanding of these issues will promote more harmonious relationships between natives and non-natives,

and reduce the resistance that some may have to righting the wrongs done to native people in the past — even where that involves returning treaty lands.⁹

In my view, governments should support education programs for the public about treaties, and about First Nations history and contemporary issues. I believe that public education is necessary both throughout the province and in areas where contentious or ongoing Aboriginal/non-Aboriginal disputes exist, such as Ipperwash, the Bruce Peninsula, Caledonia, and in Northern Ontario. The need for localized or regional public education is particularly important to help diffuse or mitigate local conflicts. The risk of violence at an Aboriginal occupation or protest increases when the local non-Aboriginal population, especially those immediately affected by the direct action, have little knowledge or understanding of the rights at issue. Public education may also help First Nations people better appreciate non-Aboriginal resistance to an Aboriginal occupation or protest.

It is up to governments and Aboriginal peoples and organizations to decide on priorities for public education, but I suggest that education about treaties in Ontario is a good place to begin.

A good example of the kind of general education campaign I envisage is an initiative of the Union of Ontario Indians: the Nijjii Circle. Nijjii is the Ojibwe word for “friends.” The Circle operates as a committee of representatives of the Anishinabek Nation and non-Aboriginal communities:

Over the past few years, the UOI [Union of Ontario Indians] has increased its efforts to raise awareness of issues facing aboriginal people through the development of what is known in northeastern Ontario as the “Nijjii Circle.” Initiated in the fall of 2001, the purpose of the Nijjii Circle is “to build relationships that create respect and understanding among all peoples in the Anishinabek Nation territory.”

Some of the projects undertaken by the Nijjii circle include participation in an anti-racism project in 2004 entitled “Debwewin,” which surveyed three cities in northeastern Ontario, a weekly page is published in the North Bay Nugget, and cross cultural training for media, the Ontario Ministry of Natural Resources (MNR) and the Canadian Armed Forces.¹⁰

Ideally, public education generally and education in the public school system would provide the necessary background to help the public understand why Aboriginal peoples occupy land or take direct action. While we work toward that

ideal, I believe it is important for governments—federal, provincial, and First Nation—to actively disseminate information to the public about the Aboriginal and treaty rights in question in specific conflicts or protests. I discuss this further in chapter 9.

7.2 The Education Mandate of the Treaty Commission of Ontario

I have recommended that the federal and provincial governments and First Nations in Ontario jointly establish a Treaty Commission of Ontario. I further recommended that the treaty commission should be given a strong mandate to promote public education about treaty and Aboriginal rights.

The treaty commissions in British Columbia, Saskatchewan, and Manitoba demonstrate that a treaty commission has tremendous potential to promote public education on treaty issues.¹¹ Each of those commissions has a mandate to promote public education about treaties, and about the historical and current role of treaties in the relationship between First Nations and non-First Nations peoples.

In the fall of 2005, I met with the Saskatchewan Treaty Commissioner, Judge David Arnot, to learn more about the Saskatchewan Office of the Treaty Commissioner (SOTC). I learned that the SOTC has an impressive public education program, which includes a treaty awareness speakers bureau, a treaty resource kit, “teaching treaties in the classroom” training for teachers, a treaty learning network, a learning centre, treaty awareness workshops, conference and trade show displays, and a website.¹²

The SOTC’s education programs are “aimed at providing a Treaty learning environment for the general public of all ages. The goals of these programs are to develop an understanding of the historical context before and at the time of the Treaty negotiations; to teach about the events that worked to undermine the spirit and intent of the treaties; and to assist participants in gaining an appreciation of the importance of treaties today.”¹³

The “Teaching Treaties in the Classroom” kit was a collaborative effort of the SOTC, the Federation of Saskatchewan Indian Nations, Indian and Northern Affairs Canada, and Saskatchewan Learning. It includes educational resource materials, curriculum supplements, and original videos and books about the history of treaties. The SOTC has distributed the kit to every school in Saskatchewan. To encourage use of these materials, the SOTC also provides in-service training for teachers. The SOTC has trained more than one-third of Saskatchewan teachers in using the kit.¹⁴

Members of the SOTC speakers bureau make presentations about treaties to any interested groups. As reported in the SOTC 2005/2006 annual report, the speakers

bureau made presentations at more than 900 events to more than 55,000 people.¹⁵

The SOTC also has a learning centre, where anyone can learn about treaties and the treaty relationship in Saskatchewan.

Similarly, the BC Treaty Commission maintains a comprehensive website and also produces newsletters, special publications, and videos and television documentaries. Commissioners deliver presentations to community forums, business organizations, schools, and post-secondary institutions. The BC Commission also produces a teacher's guide which includes background information and lesson plans on treaty-making and self-government. The teacher's guide is supplied to every elementary school in BC.

The educational potential for the Treaty Commission of Ontario is as promising as that of the Saskatchewan or British Columbia treaty commissions. I recommend, therefore, that the provincial government and new Treaty Commission of Ontario, at the earliest opportunity, work with First Nations organizations and educators to develop a comprehensive plan to promote general public education about treaties and Aboriginal peoples in Ontario. I further recommend the provincial government and Treaty Commission of Ontario work with local governments and school boards, First Nations, and community organizations to develop dedicated educational materials and strategies at the local or regional level.

7.3 Elementary School and High School Education

Aboriginal peoples are the first peoples in what is now Canada. Existing Aboriginal and treaty rights are enshrined in our Constitution. I think it is important that we have a public education system in which every student has an opportunity to learn about Aboriginal peoples, their histories, perspectives, and current concerns. It is imperative that the phrase “we are all treaty people” resonate with all Ontarians. In the longer term, this will help to improve relations between Aboriginal and non-Aboriginal peoples.

7.3.1 Curricula

Many of the parties to the Inquiry recommended that children should learn more about Aboriginal peoples and Aboriginal and treaty rights in school.¹⁶ The submission by the province described measures to be taken during the Caledonia negotiations, including that “education will be addressed through a separate tripartite working table ... that reports to the main negotiating table.”¹⁷ This effort was to include education in schools. Clearly, government and Aboriginal and non-Aboriginal

people all recognize the important role of public school education in increasing not only knowledge, but also understanding, empathy, and good relations.

Combatting misconceptions about Aboriginal and treaty rights and Aboriginal peoples and histories is one objective and one benefit of improving education about Aboriginal peoples in schools. Another advantage is the opportunity to include a rich and very diverse knowledge base in the education system, for the benefit of everyone:

Centuries of commerce, cultural evolution and social interaction among First Nations have produced a vast body of knowledge worthy of inclusion in all schools and post-secondary institutions as valid and important learning material. The integration of First Nations knowledge and wisdom into curricula and pedagogy in education systems, both in First Nations and provinces and territories, will provide First Nations learners with a positive learning environment and encourage student success. In addition, non-First Nations learners will have an opportunity to develop a more respectful and balanced view of Canadian history and culture, with a place for First Nations in it.¹⁸

One of the responsibilities of the Ontario Ministry of Education (MOE) is to set the curricula for elementary schools and high schools. MOE is making an effort to change the curricula to incorporate more Aboriginal perspectives and examples. Aboriginal educators are reviewing the old curricula and writing new ones. As a result, the number of Aboriginal examples in the curricula has increased. For example, the events at Oka and Ipperwash are now mentioned in the politics curriculum. Most recently, the MOE made several changes to the 2005/2006 school year curricula to include more Aboriginal perspectives, histories, current events, and examples.¹⁹

I am advised that there are plans to continue this revision as parts of the curricula come up for review. The English curriculum is currently being revised to include the work of First Nations and Métis writers, and the province intends to include Aboriginal perspectives in other subject areas, where relevant, as they come forward for revision over a seven-year cycle.²⁰ This approach is consistent with a recommendation by the Chippewas of Nawash Unceded First Nation that the MOE, schools, and teachers work to include Aboriginal perspectives in core courses, such as “native literature in English courses; Native history including local First Nations’ history in History courses; constitutional law and major Supreme Court decisions in Law courses; traditional aboriginal practices in Sociology or Geography courses.”²¹

Although the high school curriculum offers a number of Native Studies courses, they are not compulsory, and availability depends on the number of students who enroll.²² The majority of secondary schools do not offer these courses or do not offer them consistently.

This may explain why so many Aboriginal parties to the Inquiry believed that the province is not doing enough with respect to the public school curricula.²³ For example, the Chiefs of Ontario recommended that

[p]ublic education regarding Aboriginal issues and history must be included in Ontario's primary and secondary school curriculum. Further, all educational institutions need to examine how Aboriginal issues are approached in law, policy and public administration.²⁴

The Union of Ontario Indians also suggested that greater understanding of Aboriginal and treaty rights must begin by increasing the teaching of Aboriginal-specific history, culture, rights, and contemporary issues in the Ontario education system.²⁵

Deputy Grand Chief Nelson Toulouse of the Union of Ontario Indians emphasized the importance of including Aboriginal perspectives in the curricula and of involving Aboriginal peoples in curriculum development:

One of the biggest problems we have here in Ontario is having the society understand who we are as a people and our rights ... All students in Ontario should have access to the curriculum regarding First Nation identity, cultures, rights, and histories, which should be approved by us. Ontario should establish a formal relationship with Ontario (First Nations) with respect to curriculum development, contents ... it should not be limited to social studies, civics, Canadian history and world studies.²⁶

I commend the provincial government for including more Aboriginal perspectives and content in the school curricula. I have learned that the MOE is interested in meeting with Aboriginal peoples to discuss ways to continue this improvement.²⁷ Aboriginal involvement is crucial, since only Aboriginal peoples themselves can provide the experiences, examples, and insights needed to truly capture the Aboriginal perspective in the curricula. I recommend, therefore, that MOE establish formal working relationships with appropriate First Nations and Aboriginal organizations to develop suitable curricula for Ontario schools. As treaty commissions in other provinces have done, the Treaty Commission of Ontario could play an important supporting role in these efforts. Once again, I believe it is important that local school

boards encourage and support teachers in teaching the local or regional character of treaty relationships.

7.3.2 *Teaching Resources*

Teachers need the proper support and access to teaching tools and resources to feel prepared to teach students about Aboriginal and treaty rights, perspectives, and histories. The province advised the Inquiry that MOE is currently developing a “curriculum resource guide” to assist elementary school teachers in implementing the revised social studies, history, and geography programs in Grades 1–8 with a focus on Aboriginal perspectives in the curriculum.²⁸

In Ontario, teachers must follow the curricula set by MOE. However, they have a great deal of discretion in deciding how best to teach the curricula in a way that engages their students. I have no doubt that teachers are very creative in finding and developing teaching resources to meet the curriculum expectations. I have been advised, however, that many teachers are overwhelmed with teaching the basics to large groups of students, and that they do not have the time or expertise to develop teaching tools or resources of their own.

The MOE does not produce textbooks for schools. A number of publishers produce textbooks to meet the MOE curriculum requirements, and MOE sets the criteria under which textbooks are evaluated and selected for inclusion in the “Trillium List.” The seventy-two district school boards in Ontario purchase textbooks from this list for use in their schools. There are no approved textbooks for the high school Native Studies courses on the 2006 Trillium List.

Other “supplementary resources” are also used in classrooms. These resources are not evaluated by the MOE and they do not appear on the Trillium List. School boards are responsible for selected and evaluating these resources for use in classrooms.

A number of organizations, such as teachers’ associations, contribute to producing teaching resources. For example, the Ontario History and Social Sciences Teachers Association lists many teaching resources on its website.²⁹ Other organizations, including the Ontario Justice Education Network, provide links to organizations that produce teaching resources.

I have seen examples of what appear to be excellent teaching resources and kits in other fields. For example, the Ontario Information and Privacy Commission (IPC) produced a school program entitled “What Students Need to Know about Freedom of Information and Protection of Privacy.” The program includes three teacher’s guides, each directed at specific curriculum requirements at three grade levels. The guides are available, free of charge, in print and on the IPC website.

Since the program began in 1999, more than 30,000 copies of the guides have been sent to teachers or downloaded from the IPC website.³⁰

Another example is “Choose Your Voice: Teaching about Antisemitism and Racism in the Classroom,” produced by the Canadian Jewish Congress. This teaching resource is classroom-ready and includes teacher’s guides, fact sheets, videos, and an evaluation. About 60% of school boards in Ontario have ordered this teaching resource, including the Toronto District School Board, the largest school board in Ontario.³¹

The Chippewas of Nawash Unceded First Nation offer an Aboriginal-specific teaching resource, the “*Illustrated History of the Chippewas of Nawash*.” Written and illustrated in a form much like a comic book, it explains the history of the Chippewas and their long effort to gain government recognition of their commercial fishing rights.

I am not aware of any organization in Ontario dedicated to producing teaching resources about Aboriginal history, treaty and Aboriginal rights, and related current events. I recommend that the Ministry of Education and the Treaty Commission of Ontario work with interested First Nations, Aboriginal organizations, school boards, and teachers’ associations to develop appropriate, classroom-ready teaching tools and resources about Aboriginal history, treaty and Aboriginal rights, and related current events.

7.3.3 Teacher Training

The Ontario College of Teachers is the regulating body governing the teaching profession in Ontario. To work in publicly funded schools in Ontario, teachers must be certified to teach and must be members of the College. To obtain a teaching certificate, the usual requirements are an undergraduate degree and a one-year teacher-training program. The College, by regulation, is responsible for accrediting teacher education programs and teacher qualifications.

Laurentian University, which offers a Bachelor of Education program, has made an effort to include Aboriginal perspectives, histories, and events throughout the curriculum:

A key best practice in the province that shows commitment to equity and First Nations peoples is also found at Laurentian University. The concurrent Bachelor of Education program, which received accreditation in 2003, infuses First Nations worldview throughout the curriculum. All student teachers will receive an education that values the diversity of First Peoples in language arts, social studies, history, geography, mathematics, science/technology and the arts (visual arts,

drama, dance). The history of First Nations education is mandatory for all students and the unique approaches of First Nations people to special education is also discussed. All student teachers receive a balanced education in the tri-cultural make-up of the country (First Nations, Anglophones, Francophones).³²

I realize that some other Ontario universities include Aboriginal perspectives in parts of the education curriculum. Others offer degree programs specifically for Aboriginal people. I believe that the approach taken at Laurentian University is a good practice for other universities to emulate.

Continuing education for teachers is also important. Some school boards, and teachers' associations and other organizations such as the Ontario Justice Education Network offer continuing education for teachers in a wide variety of subjects. However, I am not aware of any organization in Ontario that specializes in continuing education for teachers in treaty and Aboriginal rights. The treaty commission in Saskatchewan provides in-service training for teachers on how to use the "Teaching Treaties in the Classroom" materials. The Treaty Commission of Ontario could, once again, help to fill this gap.

Recommendations

29. The provincial government and Treaty Commission of Ontario should work with First Nations organizations and educators to develop a comprehensive plan to promote general public education about treaties in Ontario. The provincial government and Treaty Commission of Ontario should also work with local governments and school boards, First Nations, and community organizations to develop educational materials and strategies that emphasize the local or regional character of treaty relationships.
30. The Ministry of Education should establish formal working relationships with Aboriginal organizations to promote more Aboriginal perspectives and content in the elementary and secondary school curricula.
31. The Ministry of Education and Treaty Commission of Ontario should work with Aboriginal organizations, school boards, and teachers associations to develop appropriate, classroom-ready teaching tools and resources about Aboriginal history, treaty and Aboriginal rights, and related current events.

Endnotes

- 1 See for example the following submissions: Chiefs of Ontario (Part 2), p. 33, para. 53, and recommendation C.5, p. 34; The Chippewas of Kettle and Stony Point, pp. 77-8; Aazhoojena and George Family Group, recommendations 56 and 57, pp. 226-7; Aboriginal Legal Services of Toronto (Part 1), recommendation 6, p. 149; The Estate of Dudley George and Members of Dudley George's Family, pp. 140-4, recommendation 6; The Union of Ontario Indians, recommendation 13; Mennonite Central Committee of Ontario; and the Ontario Provincial Police and its Senior Officers (Part 2), paras. 201-2 and recommendation 16, p. 105. Several speakers at the Chiefs of Ontario Special Assembly on March 8 and 9, 2006 (Inquiry project) and our community consultation in June 2006 (Inquiry event) also emphasized the importance of education.
- 2 Kevin Simon testimony, December 2, 2004, Transcript p. 75.
- 3 For example: (i) Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996); (ii) Saskatchewan. Task Force on Multiculturalism, *Multiculturalism in Saskatchewan: Report to Ministers' Committee on Multiculturalism* (Regina: Task Force on Multiculturalism, 1989); (iii) Saskatchewan. Commission on First Nations and Métis Peoples and Justice Reform, *Report of the Commission on First Nations and Métis Peoples and Justice Reform* (Saskatchewan Department of Justice, 2004); (iv) Nova Scotia. Royal Commission on the Donald Marshall, Jr. Prosecution, *Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations* (Halifax: Queen's Printer, 1989).
- 4 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 5: Renewal: A Twenty-Year Commitment* (Ottawa: Supply and Services Canada, 1996), ch. 4, quoting Robert Debassige, Tribal Chairman and Executive Director of the United Chiefs and Councils of Manitoulin, at Toronto, Ontario, November 18, 1993.
- 5 Mennonite Central Committee of Ontario submission, p. 3.
- 6 Chippewas of Kettle and Stony Point submission, p. 77.
- 7 Community consultation at the Thedford Arena, June 21, 2006 (Inquiry event).
- 8 Ontario Regional Chief Angus Toulouse, speaking at the March 8 and 9, 2006 Chiefs of Ontario Special Assembly (Inquiry event).
- 9 Estate of Dudley George and Members of Dudley George's Family submission, p. 140.
- 10 The Union of Ontario Indians, "Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario" (Inquiry project), p. 9. The Nijiji circle initiative won a Canadian Race Relations Foundation Award of Excellence in 2003.
- 11 See generally the following websites: BC Treaty Commission <<http://www.bctreaty.net>>, Office of the Treaty Commissioner (Saskatchewan) <<http://www.otc.ca>>, and Treaty Relations Commission of Manitoba <<http://www.trcm.ca>>.
- 12 Saskatchewan. Office of the Treaty Commissioner, 2005-2006 Annual Report: "We are All Treaty People" (Saskatoon: 2007), p. 20. The OTC's education programs received the Canadian Race Relations Foundation Award of Excellence in October 2005. In 2004, the education programs were recognized by the United Nations Special Rapporteur on Racism as encouraging better relations between Saskatchewan's Aboriginal and non-Aboriginal communities.
- 13 *Ibid.*, p. 22.
- 14 *Ibid.*, p. 23.
- 15 *Ibid.*, p. 20.
- 16 See examples in note 1.
- 17 Province of Ontario Part 2 submission, para. 53.

- 18 Canada. Department of Indian and Northern Affairs Canada. *Final Report of the Minister's National Working Group on Education: Our Children — Keepers of the Sacred Knowledge* (December 2002), ch. "Quality in First Nations Education" <http://www.ainc-inac.gc.ca/ps/edu/finre/bac_e.html>.
- 19 Ontario Ministry of Education, "Curriculum" <<http://www.edu.gov.on.ca/eng/curriculum>>. In the elementary curriculum, changes were to Social Studies (for grades 1 to 6) and History and Geography (for grades 7 and 8). In the secondary curriculum, the changes were to Canadian and World Studies for grades 9 and 10 and for grades 11 and 12.
- 20 Province of Ontario Part 2 submission, para. 51.
- 21 The Chippewas of Nawash Unceded First Nation, "Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash" (Inquiry project), p. 169.
- 22 For a discussion of a survey conducted in Ontario to determine how many schools were offering Native studies courses, see Emily J. Faries, "First Nations Curriculum," in Chiefs of Ontario, "The New Agenda: A Manifesto For First Nations Education in Ontario" (2004), ch. 14, <<http://www.chiefs-of-ontario.org/education/manifesto.html>> (accessed January 17, 2007).
- 23 See the following submissions: Aazhoodena and George Family Group, pp. 226-7, recommendations 56 and 57; Aboriginal Legal Services of Toronto (Part 1), p. 149, recommendation 6; The Union of Ontario Indians, recommendation 13.
- 24 Chiefs of Ontario Part 2 submission, p. 33, para. 53.
- 25 The Union of Ontario Indians, pp. 8-9 and The Union of Ontario Indians submission, recommendation 13.
- 26 Chiefs of Ontario Special Assembly, March 8 and 9, 2006 (Inquiry project).
- 27 Province of Ontario Part 2 submission, para. 53.
- 28 Ibid., para. 50.
- 29 Ontario History and Social Sciences Teachers' Association, <<http://www.ohassta.org/main.htm>>.
- 30 The Ontario Information and Privacy Commission, Annual Report 2005, <http://www.ipc.on.ca/images/Resources/up-ar_05e.pdf> (accessed January 18, 2007).
- 31 Information provided by Melanie Simons, Special Projects Coordinator, FAST (Fighting Antisemitism Together), Canadian Jewish Congress.
- 32 Faries.

PROVINCIAL LEADERSHIP AND CAPACITY

During the course of the Inquiry, it became clear that there are many complex political, legal, and policy issues that affect the lives of Aboriginal people. The Inquiry addressed the settlement of land claims, the development of natural resources within traditional territories, the duty to consult and accommodate, Aboriginal and treaty rights, and the protection of Aboriginal archaeological, burial, and other sacred sites, but these areas do not represent the entire spectrum of public policy issues facing Aboriginal peoples.

In its New Approach to Aboriginal Affairs document, released in the spring, 2005, the provincial government committed to addressing other challenges, such as Aboriginal health, education, and urban matters. All of these issues are extremely difficult and complex. The best approach to individual policy challenges may be different in each case, and it is important to recognize that flexibility is the key to progress.

In my view, Aboriginal issues need a higher profile, clearer focus, and more resources within the Ontario government. However, the need for improved capacity, coordination, and institutional supports is not restricted to the government itself. If Ontario is to make substantial progress on the Aboriginal issues outlined in this report, First Nations and Aboriginal peoples also require the resources and skills necessary to fulfill their responsibilities. I believe, therefore, that the provincial government must also commit to significantly improving capacity within First Nations.

8.1 A Provincial Ministry of Aboriginal Affairs

I have come to the conclusion that the complexity and importance of Aboriginal issues has outgrown the institutional arrangements dedicated to them within the provincial government. I recommend, therefore, that the provincial government create a dedicated Ministry of Aboriginal Affairs, with a clear mandate and authority, with its own minister and deputy minister, a separate budget, and with a seat at the Cabinet table. Creating this ministry would go a long way toward ensuring that Aboriginal issues receive the priority and focus they deserve and it would also herald a commitment by the province to a new, constructive relationship with Aboriginal peoples. Moreover, my study of Aboriginal issues in the course of this Inquiry has convinced me that the challenges to provincial administration are growing. A dedicated ministry would promote coordination and

capacity on Aboriginal issues throughout the provincial government to meet those challenges. For all these reasons, I believe that the province needs to devote more time, attention, and resources to Aboriginal issues if Ontarians hope to move forward. It follows, therefore, that the provincial government should commit to an institutional structure commensurate with its new and growing responsibilities. A new and dedicated Ministry of Aboriginal Affairs is the best way this can be accomplished.

Ontario has never had a dedicated Ministry of Aboriginal Affairs or a minister with sole responsibility for the Aboriginal portfolio, as far as I can determine. To the extent that Aboriginal issues have been consolidated within government, they have been grouped together in a secretariat within another ministry. For example, at the time of the Ipperwash incident in 1995, the Ontario Native Affairs Secretariat (ONAS) was a department within the provincial Ministry of the Attorney General. The current Ontario Secretariat for Aboriginal Affairs (OSAA) is a department within the Ministry of Natural Resources. With the exception of a period in the 1990s when ONAS had its own dedicated deputy minister, the administrative side has been headed by an assistant deputy minister, reporting to a deputy minister with other responsibilities.

Most often, the secretariat has been housed in the Ministry of Natural Resources or the Ministry of the Attorney General. The absence of a dedicated minister and deputy minister means that it is inevitable that the heavy demands of other duties will frequently overshadow Aboriginal issues in these circumstances. That is not to say that a minister or deputy minister with combined responsibilities cannot give priority attention to Aboriginal issues in a crisis. For example, I have no doubt that the current minister responsible for OSAA has spent an enormous amount of time and energy on the Caledonia file. But I am not confident that other important Aboriginal priorities can easily find their way to the top of the deputy minister's senior management committee agenda or the Cabinet agenda. A dedicated ministry would focus the necessary attention on these important issues. A dedicated ministry would also eliminate what some see as the inherent conflict of interest arising from placing Aboriginal affairs in a larger ministry.

Ontario has had a great deal of experience with a shared responsibility model for administering Aboriginal affairs. However, some of the parties and witnesses in this Inquiry, including at least one former minister, several former and current civil servants, and a number of Aboriginal parties, told me that this may no longer be the best model. Their views have merit, and I am convinced that part of the current set of problems stems from organizational and operational design. In my view, the Aboriginal affairs portfolio requires the same priority as other important public responsibilities, including the status that flows from a dedicated

ministry, the impact that a dedicated minister has on overall provincial public policy, and the institutionalized expectations of accountability and administrative influence accorded to a deputy minister within the public service.

An Aboriginal affairs ministry would not be unprecedented in Canada. In June 2005, the government of British Columbia created a new Ministry of Aboriginal Relations and Reconciliation, with its own minister and deputy minister. Presumably, the objective of this reform was to raise the profile of Aboriginal issues within the provincial administration and to ensure that Aboriginal priorities received the consistent and dedicated attention they deserve. Saskatchewan has a Department of First Nations and Métis Relations, with a dedicated deputy minister. Alberta and Manitoba have implemented models similar to the federal Department of Indian and Northern Affairs, with dedicated ministers and deputy ministers assigned to these important portfolios.

The current Ontario government has recent experience with establishing a new ministry. Upon assuming office in the fall of 2003, the new government created the Ministry of Children and Youth Services. The new ministry pulled together a number of child-related programs, previously housed elsewhere in government, under a dedicated minister and deputy minister. From what I have been able to determine, this change has succeeded in enhancing both the profile and the effective operation of child-centred programs. The government could build on this success and apply the lessons learned from implementing that new ministry to the equally important area of Aboriginal affairs.

For a new dedicated ministry to succeed, the government must also ensure that the necessary structures and resources are in place. I have a number of ideas here.

8.1.1 Leadership, Structure, and Coordination

Given the increasing complexity of Aboriginal affairs in Ontario, it is extremely important to assign the right person to the office of Minister of Aboriginal Affairs; someone who is committed to the issues, understands how to advance them within government, and can speak credibly and forcefully to Aboriginal communities and to the broader public. If the government wants to move the Aboriginal agenda forward into a new era, and has the political will to do so, it is critical that a strong, competent minister be appointed who can rise to the challenge of being the Minister of Aboriginal Affairs in Ontario.

A number of structural mechanisms are also important to help the new minister and deputy minister.

The provincial government needs to create an appropriate Cabinet structure to support the new ministry. One of the parties to the Inquiry suggested that the

new minister have a permanent seat on the Priorities and Planning Board of Cabinet. Others suggested that the minister should chair a new Cabinet Committee on Aboriginal Affairs. Although I am not making recommendations about specific Cabinet structures, I do believe that such a new Cabinet committee, chaired by the new minister, with representation from other ministers with responsibility for certain Aboriginal issues, would make good sense. I recommend, therefore, that the provincial government consider establishing a new Cabinet committee on Aboriginal Affairs and including the Minister of Aboriginal Affairs on the Priorities and Planning Board of Cabinet.

I have enough experience with public administration to know that appropriate structural support is vital and must be given careful consideration. A great deal of work needs to be done to define and restructure certain program responsibilities, grapple with difficult budget allocation issues, and pull together the right people to meet the new challenges. A new minister must have these structural supports in order to succeed in the role.

Creating the position of a dedicated deputy minister would trigger a set of institutional structures that would enhance the importance and effectiveness of Aboriginal programs. Instead of relegating the issue to the portfolio of another ministry as a secondary component, the new deputy minister would develop a comprehensive business plan focused on Aboriginal issues, bring that business plan forward to the minister and then to Cabinet for approval, and then administer it in accordance with the regular reporting and other internal accountability systems in place for all deputy ministers. Equally important, the evaluation of a dedicated deputy minister's job performance (and compensation) would be based on demonstrated success in advancing a portfolio of Aboriginal-specific initiatives and priorities, instead of other, possibly unrelated initiatives. The degree of focus on the Aboriginal policy and program agenda and the amount of time dedicated to it at the highest levels of the Ontario public service would no doubt improve as a result.

8.1.2 Mandate and Programs

The current program portfolio at OSAA should be the starting point for the new ministry. OSAA has a great deal of expertise on Aboriginal issues, particularly in the area of treaty rights and land claims negotiation, and it has developed relationships with a cross-section of Aboriginal communities throughout the province. Ways to build the portfolio beyond these key areas of responsibility must be considered very carefully.

Several Ontario ministries currently have Aboriginal affairs units, including Natural Resources and Education. Others, such as the Ministry of Community Safety and Correctional Services and Health and Community and Social Services,

have programs specifically targeted to Aboriginal peoples. Unless there is a compelling reason to do so, I am not recommending that these programs be transferred to the new dedicated ministry. However, the new ministry must have the ability to coordinate and lead the overall direction of the government in all areas that touch upon Aboriginal issues.

Drawing on what I have learned through this Inquiry, I feel that the mandate of the new Ministry of Aboriginal Affairs must be clearly and narrowly focused, at least initially. It will not be able to grapple with all of the complex and sometimes intractable Aboriginal-related policies and programs, and the new ministry must not become a place to which other ministries transfer difficult problems that have defied resolution for many years. That would be a recipe for failure. Expectations must be reasonable, inside and outside government, and objectives must be manageable and clearly understood by everyone.

I recommend that the mandate of the new Ministry of Aboriginal Affairs, at least initially, be restricted to the following responsibilities and programs:

8.1.2.1 Land Claims

In chapters 3 and 4, I discussed the current land claims process in Ontario and made a number of recommendations for ways to improve it.

It is clear to me that, for the foreseeable future, the negotiation and resolution of outstanding land claims will form the core responsibilities of the new ministry. Representing Ontario with the federal government and with First Nations on any current or future tripartite initiatives with respect to land claims will be another important aspect of this area of responsibility.

Although OSAA has developed a strong reputation for its expertise in land claims issues, it is indisputable that insufficient resources hamper the organization. Clearly, if Ontario wants to make a breakthrough in successful and timely land claims settlements, the government needs to significantly increase the current budget and improve its capacity to move the provincial land claims agenda forward.

8.1.2.2 Treaty Commission of Ontario

In chapter 4, I described in detail the need to establish an independent Treaty Commission of Ontario. I also identified some of the roles and responsibilities for this new legislative office, which include facilitating and overseeing the settlement of specific land claims in Ontario, ensuring that the claims process is accountable and transparent, and promoting public understanding of the importance of treaties in Ontario. In my view, this is the single most important recommendation I am making regarding land claims and treaty rights.

The Treaty Commission of Ontario needs a champion within government, and this must be one of the most important responsibilities of the new Minister of Aboriginal Affairs. In the short run, the minister will need to define the roles and responsibilities of the Treaty Commission, develop the consultation and policy framework required to create the new office, shepherd the initiative through the consultation, policy, and legislative approval processes, and most importantly, ensure that the Treaty Commission of Ontario is given adequate human and financial resources to perform the job effectively. This is “job one” for the new minister—to take the necessary steps to ensure that a new Ontario Treaty Commissioner is in place by a specific date. I suggest March 31, 2008, approximately one year after the release of this report.

However, the job does not end there. The Treaty Commission of Ontario and the person chosen to lead it will need ongoing support from the minister to help implement what amounts to a fundamentally different approach to the administration of land claims in Ontario. These are long-term challenges that require both an independent oversight body and an internal Aboriginal advocate. The ultimate success of the new model I propose will depend on the ability of the new commissioner and the new minister to find effective ways to work collaboratively for the overall benefit of both Aboriginal and non-Aboriginal Ontarians.

8.1.2.3 Education

One of the most common recommendations made by parties to this Inquiry was the need for better public education on Aboriginal affairs. I have addressed this topic in detail in chapter 7, where I identified public education as one of the core mandates for the new Treaty Commission of Ontario.

If my recommendations are accepted, the first Treaty Commissioner in Ontario could be appointed as soon as the spring of 2008. In the meantime, the Ministry of Aboriginal Affairs should give priority to defining the new commissioner’s public education mandate. The Treaty Commissioner of Ontario will need ongoing support from various parts of government, including the Ministry of Education, the Ministry of Colleges and Universities, and First Nations in Ontario. This coordinating role should be the ongoing responsibility of the new Ministry of Aboriginal Affairs.

8.1.2.4 Consultation and Accommodation

The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian*

Heritage) (discussed in chapter 3) has provided clear direction to governments on the principle of the “honour of the Crown” and the duty of governments to consult Aboriginal peoples and accommodate their interests when contemplating any action that may have an impact on Aboriginal or treaty rights. Past approaches are simply no longer adequate. Consultations must be meaningful and the most appropriate consultation processes will depend on the characteristics of the initiative under consideration.

In June 2006, OSSA released *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights*. As noted earlier, Ontario has still to determine the most effective way to implement these new consultation processes throughout government, and then to develop the internal expertise required to conduct the actual consultations as the need arises. Logically, this new area of responsibility should be housed in the Ministry of Aboriginal Affairs and it will require additional dedicated resources.

8.1.2.5 *Improving Aboriginal/Non-Aboriginal Relations*

One of the recurring themes during the course of this Inquiry was the importance of dialogue. Aboriginal and non-Aboriginal people are all members of the broader Ontario community. They share many of the same perspectives and public policy priorities, but they hold legitimate but different views on others. These areas of difference are part of what makes Ontario whole.

We sometimes lose sight of the importance of dialogue in coming to grips with these differing community views. Knowledge is often the key to understanding, and Ontario needs to do a better job of building relationships throughout our varied communities, particularly those where Aboriginal and non-Aboriginal people live together.

The Mennonite Central Committee was a party to the Inquiry. In its submissions, the Committee described its efforts to build good community relationships in the Six Nations/Caledonia area. The Mennonites recognize that there are many challenges, and made the following very important point:

But the alternatives to the building of good relationships seem clear; more misunderstanding, more confrontation, more violence. I am hopeful that we can do better than that. We believe that only when local, community-to-community relationships are healthy, will policing relationships move to where we need them to be, and will land claims be settled in ways that all parties can accept and even celebrate. Building these local communities of understanding is vital to the large scale structural changes we require.¹

I could not have said it better.

The Union of Ontario Indians (UOI) was also a party to the Inquiry. As I mentioned in chapter 7, the UOI established the Nijjii Circle, a committee which includes representatives of the Anishinabek Nation and non-Aboriginal communities, “to build relationships that create respect and understanding among all peoples in the Anishinabek Nation territory.” The projects of the Nijjii Circle include the Debwewin anti-racism project, a weekly Aboriginal issues page published in the *North Bay Nugget*, and cross-cultural training offered to the media, the Ontario Ministry of Natural resources (MNR), and the Canadian Armed Forces.²

We need to commit to building genuine relationships, no matter how challenging this goal may seem, and the new Ministry of Aboriginal Affairs is the logical place to house this responsibility.

I recommend that a fund be created for the purpose of financing relationship-building initiatives modeled on the efforts of the UOI and the Mennonite Central Committee in this area, administered by the Ministry of Aboriginal Affairs.

8.1.2.6 Ontario Aboriginal Reconciliation Fund

Later in this chapter, I recommend that the provincial government establish and fund an Ontario Aboriginal Reconciliation Fund, modeled on the First Nations New Relationship Trust Fund in British Columbia. The Ministry of Aboriginal Affairs should have the responsibility for establishing this fund.

8.1.2.7 Implementing the Recommendations

It makes sense to assign the new ministry, as a key short-term priority, responsibility to oversee and report on the implementation of the recommendations of this Inquiry.

8.1.3 Resources

It appears that OSAA does not have sufficient resources to fulfil its many current responsibilities.

It is interesting to note that the new BC Ministry of Aboriginal Relations and Reconciliation has more staff and resources than OSAA has. The Inquiry was advised that the BC ministry currently has 132 employees and that its budget estimate for 2006/07 is \$33-million. This estimate does not include the funding for the BC New Relationship Trust Fund (discussed below), or the Treaty Commission of British Columbia. By contrast, OSAA appears to have

approximately half the staff and an annual budget of only \$21 million.³ Thus, the provincial government in Ontario appears to dedicate fewer resources to Aboriginal issues than its counterpart in BC, even though Ontario has a larger Aboriginal population than BC.⁴

The new Ministry of Aboriginal Affairs will need resources proportionate to its broader mandate and additional responsibilities. I recommend that the provincial government commit sufficient resources to enable the new ministry to carry out those responsibilities. Its budget should include funding for a revitalized land claims process in Ontario, for the Ontario Aboriginal Reconciliation Fund, and for programs to improve Aboriginal/non-Aboriginal relations in Ontario.

8.1.4 Ministerial Advisory Committees or Roundtables

A new minister will also need the benefit of input from the Aboriginal community, both formal and informal, and the minister must develop mechanisms that facilitate constructive dialogue. The Chiefs of Ontario and the Union of Ontario Indians both made recommendations on this topic, and I support them. The Chiefs suggested a new ministerial advisory committee; the Union prefers a First Nations council. Both are good ideas. The important thing is that the province and new ministry establish a permanent structural mechanism to obtain regular input. Both must be given the benefit of expert opinion and Aboriginal perspectives on planning, policy, legislation, and programs affecting Aboriginal interests.

I also support related suggestions from the Union of Ontario Indians to improve linkages between Aboriginal leaders and government officials. The Union recommended the incorporation of First Nation and Government Roundtables on specific legislative and policy development processes. Interestingly, the Union further recommended that these Roundtables could contribute to the broader strategic planning process within the ministry, helping to ensure that larger and more complicated goals and objectives have the benefit of Aboriginal input. Both of these ideas warrant careful consideration.

8.2 An Ontario Aboriginal Reconciliation Fund

First Nations and Aboriginal peoples in Ontario will need the resources and skills to effectively participate in the new processes and institutions recommended in this report. I believe, therefore, that the provincial government should commit to significantly improving the capacity and institutional supports for First Nations and Aboriginal peoples in Ontario.

The BC government has established an important precedent in this area: the New Relationship Trust Fund. The New Relationship Trust resulted from the

New Relationship agreement signed by the BC government and the First Nations Leadership Council in 2004. The New Relationship Trust Fund was established “to provide First Nations with the tools, training and skills to participate in the New Relationship with government so they can effectively participate in land and resource management, land-use planning processes and development of social, economic and cultural programs for their communities.”⁵

The *New Relationship Trust Act* took effect on March 31, 2006. It created an independent corporation, the New Relationship Trust Corporation, to administer an initial government grant of \$100 million over three years. A seven-member board of directors manages the fund.

I recommend that the provincial government establish and fund an Ontario Aboriginal Reconciliation Fund, modeled on the First Nations New Relationship Trust Fund. Its purpose would be to improve the capacity of First Nations and Aboriginal peoples in Ontario to participate in the many land claim, treaty, or Aboriginal policy and consultation processes underway in the province at any given time. As noted earlier, the Ministry of Aboriginal Affairs should have the responsibility within the provincial government for establishing the fund. The Ministry of Aboriginal Affairs should work with First Nations and Aboriginal organizations to determine the mandate, governance structure, funding guidelines, and administrative structure of the fund.

The New Relationship Trust Fund in BC was given an initial government grant of \$100 million over three years. I do not consider this a precedent or benchmark for the Ontario Aboriginal Reconciliation Fund. The circumstances and needs of each province are unique. I recommend, however, that the provincial government in Ontario commit sufficient resources to the fund to enable it to achieve its objectives.

Recommendations

32. The provincial government should create a Ministry of Aboriginal Affairs. This ministry should have a dedicated minister and its own deputy minister.
33. The provincial government should create the appropriate Cabinet structure to support the new ministry. The provincial government should consider establishing a new Cabinet committee on Aboriginal Affairs and should consider including the Minister of Aboriginal Affairs on the Priorities and Planning Board of Cabinet.

34. The initial mandate and responsibilities of the Ministry of Aboriginal Affairs should include the following:
 - a. Administer and support a revitalized land claims process in Ontario.
 - b. Create and support a Treaty Commission of Ontario.
 - c. Ensure that the province fulfills its duty to consult and accommodate.
 - d. Improve Aboriginal/non-Aboriginal community relationships.
 - e. Establish the Ontario Aboriginal Reconciliation Fund.
 - f. Oversee and report on the implementation of the recommendations of the Ipperwash Inquiry.
35. The provincial government should commit sufficient resources to the Ministry of Aboriginal Affairs to enable it to carry out its responsibilities. The budget for the ministry should include funding for a revitalized land claims process in Ontario, for the Ontario Aboriginal Reconciliation Fund, and for programs to improve Aboriginal/non-Aboriginal relations in Ontario.
36. The provincial government and Ministry of Aboriginal Affairs should create mechanisms for obtaining input from Aboriginal communities on planning, policy, legislation, and programs affecting Aboriginal interests.
37. The provincial government should establish and fund an Ontario Aboriginal Reconciliation Fund. The Ministry of Aboriginal Affairs should work with First Nations and Aboriginal organizations to determine the mandate, governance structure, funding guidelines, and administrative structure of the fund. The provincial government should commit sufficient resources to the fund to enable it to achieve its objectives.

Endnotes

- 1 Mennonite Central Committee of Ontario submission, p. 4.
- 2 The Union of Ontario Indians, “Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario” (Inquiry project), p. 9.
- 3 British Columbia, Ministry of Finance, “Budget and Fiscal Plan 2006/07-2008/09,” Ministry of Aboriginal Relations, budget estimate, in “Expense by Ministry, Program and Agency,” p. 11, table 1.4, <http://www.bcbudget.gov.bc.ca/2006/bfp/BudgetandFiscalPlan_06.pdf>. See also Ontario, Ministry of Finance, 2006 Ontario Budget, <http://www.fin.gov.on.ca/english/budget/ontariobudgets/2006/pdf/papers_all.pdf>. The Ontario Budget Papers indicate that the actual expenses of the Ontario Secretariat for Aboriginal Affairs for 2004/05 were \$21 million. This figure does not include the many other Aboriginal programs and units throughout the Ontario government.
- 4 Statistics Canada, Census 2001, Aboriginal Identity Population, 2001 Counts, for Canada, Provinces and Territories – 20% Sample Data, <<http://www12.statcan.ca/english/census01/products/highlight/Aboriginal/Page.cfm?Lang=E&Geo=PR&View=1a&Table=1&StartRec=1&Sort=2&B1=Counts01&B2=Total>>. According to the 2001 Census, 170,025 British Columbians, or 4.4% of the population, self-identified as Aboriginal. The same census reported that 188,315 Ontarians, or 1.7% of the population, self-identified as Aboriginal. Ontario’s total population (11,285,545) was approximately three times larger than British Columbia’s (3,868,875) in 2001.
- 5 Government of British Columbia, “The New Relationship with First Nations and Aboriginal People,” New Relationship Trust Board, <<http://www.gov.bc.ca/arr/newrelationship/trust/board.html>> (accessed January 22, 2007.)

POLICING ABORIGINAL OCCUPATIONS

I have interpreted my mandate in Part 2 as encompassing both “systemic” and “operational” policy issues. Broadly speaking, “systemic” issues are those that may lead Aboriginal people to mount protests or occupations in the first place. “Operational” issues arise once an occupation has begun.

So far, I have focused my analysis and recommendations on “systemic” issues, processes, or initiatives to prevent protests and occupations in the first instance. Nevertheless, Aboriginal occupations and protests will likely remain a feature of Canadian life and policing for some time. As a result, there will always be times when the police are needed to restore and maintain order so that Aboriginal peoples and governments can negotiate disputes peacefully, effectively, and in a timely manner. Accordingly, this chapter considers a range of “operational” issues concerning how the police can prepare for and respond to Aboriginal occupations and protests so as to minimize the risk of violence when they occur.

In chapter 2, I discussed how prevalent Aboriginal protests have become. Recent events in Caledonia and at Kitchenuhmaykoosib Inninuwug First Nation (Big Trout Lake) show that Aboriginal protests and occupations can and do occur throughout the province, often with little warning. The flashpoints are very likely as intense today as they were during Ipperwash, Oka, Burnt Church, or Gustafsen Lake. I believe that the fundamental conditions and catalysts that spark such protests continue to exist in Ontario, more than a decade after Ipperwash.

Aboriginal protests and occupations undoubtedly mirror many of the characteristics and dynamics of non-Aboriginal public order events. However, Aboriginal protests and occupations must be considered a separate and unique form of protest. The context is so fundamentally different that they require dedicated and unique police resources, strategies, and responses.

The objectives of the police services and police leaders during Aboriginal protests and occupations should be to minimize the potential for violence, to facilitate the exercise of constitutionally protected rights, to protect and restore public order, and, if possible, to facilitate the building of trusting relationships that will assist Aboriginal and non-Aboriginal policy-makers in resolving the dispute at issue constructively.

Organizationally, police services must devote both time and resources to building capacity to respond to Aboriginal protests and occupations. This means

ensuring that the police service has dedicated leadership and officers who are trained in Aboriginal history, law, and customs. It also means that an integrated peacekeeper police response to Aboriginal occupations and protests should include Aboriginal and non-Aboriginal officers, the OPP, and First Nation police services. Members of this integrated team must be trained in Aboriginal history, customs, legal issues, community dynamics, and peacekeeping in addition to conventional policing and public order tactics.

Police strategy must emphasize the development of communication networks and trusting relationships with Aboriginal peoples before, during, and after protests. This approach necessarily involves communication, collaboration and partnerships with First Nations and Aboriginal leaders and communities. Police officers who work closely with Aboriginal communities in this way will be better able to identify and defuse potentially violent confrontations.

Aboriginal protests and occupations may also require appropriate intervention by the federal and provincial governments. This is because Aboriginal protests and occupations very often raise public policy and legal issues that are well beyond the scope of public order policing and the authority of police services. Governments and the public must acknowledge and understand the appropriate limits of policing in these situations. The police role is to restore order, not to find or facilitate a solution to the underlying dispute. As I explain in chapter 12, governments should not avoid their constitutional obligations to First Nations and Aboriginal peoples under the cloak of keeping out of police “operational matters.”

The approach I am recommending is designed to promote best practices “directed to the avoidance of violence in similar circumstances” by embedding those practices throughout the political, civil service, and policing systems in Ontario. These recommendations are intended to codify the lessons of Ipperwash with respect to reducing violence and the likelihood of further tragedy. Aboriginal and non-Aboriginal Ontarians must be reassured that peacekeeping is the goal for both police and government, that treaty and Aboriginal rights will be respected, that the right to peaceful assembly will be protected, that negotiations will be attempted at every reasonable opportunity, and that force will only be used as a last resort.

I welcome the steps already taken by the Ontario Provincial Police, the Royal Canadian Mounted Police, and other police services, to develop and implement policies consistent with the approach I recommend herein. These police services should be commended for their commitment to developing constructive policies and practices. However, more can and should be done by police services to ensure that this approach is entrenched in police policy and operations. Furthermore,

the provincial and federal governments can and should take positive steps to ensure that this approach is supported by government policies and actions before, during, and after Aboriginal protests and occupations. Just as importantly, government leaders should take steps to educate the non-Aboriginal public about the benefits of this policing strategy.

The policies and guidelines I recommend will restrict the power of the police and governments to act unilaterally. Yet they also give police and government more legitimacy when coercive force is justified. I am confident that better transparency and accountability in the police response to Aboriginal occupations and protests will reduce the risk of violence and increase respect for Aboriginal and treaty rights.

The background papers prepared for the Inquiry by academics and policing professionals, including Professor John Borrows, Professor Don Clairmont and retired RCMP Inspector Jim Potts, Professor Willem de Lint, and retired RCMP Assistant Commissioner Wayne Wawryk, were very helpful in this area.¹

Finally, it is important to note that there have been considerable changes in the policing of Aboriginal occupations and protests and in the relationship between Aboriginal peoples and the police in the last twelve years, and I have taken these developments into account.

In this chapter, I focus largely on the general principles and policies that should guide the police response to Aboriginal occupations and protests. In general, I do not address the tactical aspects of policing, including weaponry, police training, operational decisions, and incident command, but I refer to these issues where necessary.² I concentrate primarily on the OPP, because the OPP will continue to be the police service that most frequently responds to Aboriginal occupations and protests in Ontario, and it was the police service involved at Ipperwash. Nevertheless, many of the issues are also very relevant to other police services in Ontario.

This topic is important to Aboriginal protesters, Aboriginal communities, and the police, but every Ontarian should be concerned about the policing of Aboriginal protests. The right to peaceful assembly is fundamental to democracy and is enshrined in section two of the Canadian *Charter of Rights and Freedoms*. The personal safety of all citizens in the course of a protest depends on the police exercising restraint and using force only as a last resort. Moreover, violence inflames police/Aboriginal relations and makes the resolution of important legal, social, and economic issues considerably more difficult. Thus, we all have an interest in avoiding violence and promoting peaceful resolution of Aboriginal disputes.

Before beginning this section, I must also emphasize that the term “occupations

and protests” must be understood in its proper context. There is sometimes a tendency to conflate “occupier” with “trespasser,” or to assume that the protest is somehow illegitimate. Neither of these assumptions is true, particularly in the case of Aboriginal occupations and protests. Aboriginal peoples have unique constitutional rights and claims on land in this country. As I explained in chapters 2 and 3, most Aboriginal occupations and protests are last-ditch efforts to assert those rights. Thus, it is incorrect to simply assume that Aboriginal protesters are trespassers given that the rights of Aboriginal peoples are usually the fundamental issue in dispute. Moreover, everyone in Canada, irrespective of their ancestry, has the constitutional right to peaceful assembly and expression.

9.1 Learning from Ipperwash

The strategy, tactics, and implementation of the OPP’s policing of the protest at Ipperwash are discussed in considerable detail in the first volume of this report. I will not repeat the details of my findings in Part 1 here, but I will comment on the lessons and themes that emerge from those findings for Part 2.

The first lesson that emerges is the need for dedicated police strategy, tactics and resources to respond to an Aboriginal occupation and protest. Ipperwash proved that the conventional tactics used to police public order events were not effective for policing an Aboriginal occupation. In retrospect, it is clear that the OPP did not yet have the organizational insight or capacity needed to promote or sustain the kind of “peacekeeping” strategy that might have proved more effective in the long run.

A second lesson that emerges is the need for consistency and coordination between OPP and provincial government policies respecting Aboriginal occupations and protests. The evidentiary record at Ipperwash demonstrated that the OPP and key members of the provincial government, including the Premier, had different perspectives on how to police the occupation. The OPP’s wish to pursue a go-slow approach contrasted sharply with the provincial government’s desire for a quick end to the occupation. This disagreement mirrored the conflict between the civil service and elected officials. It would have been helpful for both the OPP and provincial government to have established clear, written, binding policies setting out their respective roles, responsibilities, and understandings of how each would respond to an Aboriginal occupation.

A third important lesson concerns the view shared by many police and provincial government witnesses that the occupation was essentially a straightforward matter of trespassing that primarily required a law enforcement response. In particular, elected officials largely ignored or downplayed the historic grievances

of the occupiers or their potential legitimacy. This proved to be a mistake for several reasons. First, it may have led many people to underestimate or misinterpret the resolve of the occupiers. Second, it may have foreclosed the possibility of initiating a constructive, peaceful dialogue with the occupiers or elected representatives of the Kettle and Stony Point First Nation on substantive issues. Third, it denied the crucial role of governments, both federal and provincial, to proactively promote peaceful resolutions of Aboriginal rights disputes, particularly when those governments are themselves often the source of the dispute in the first place.

Fourth, Ipperwash demonstrated the risks of diffusing responsibility for collecting, interpreting, and communicating information about police operations. At several times during the occupation, MNR officials communicated sensitive, unreliable, or extremely provocative information to Queen's Park. Ipperwash showed that these kinds of back-channel or secondary lines of communication are fraught with difficulties. Ipperwash proved that police and government must respect appropriate chains of command during a crisis.

Finally, the evidentiary record at Ipperwash demonstrates the importance of police accountability. Certain radio transmissions and meetings at the OPP's Ipperwash command centre were not recorded, making it more difficult to determine what happened and why.

9.2 Developments in Public Order Policing

9.2.1 *The Evolution of Public Order Policing*

Our research during the Inquiry found several parallel and complementary developments in public order policing and the policing of Aboriginal occupations and protests. Thus, it is important to understand recent developments in public order policing and appreciate their application to policing Aboriginal occupations and protests.

The policing of protests in Western countries has become "institutionalized," in that the police and protesters often have a considerable amount of information about each other. Both sides have well-developed expectations about how everyone is supposed to behave. This fundamental shift in public order policing has extended to Aboriginal protests.³

Professor Willem de Lint defined public order policing as "the use of police authority and capacity to establish a legitimate equilibrium between governmental and societal, collective and individual, rights and interests in a mass demonstration of grievance."⁴ His definition highlights the tension between rights and

public order inherent in policing public order events. Establishing and maintaining the balance between rights and order is the key issue for policing public order events.

In the last fifteen years or so, police services in Canada have significantly reformed and updated their public order strategy and tactics. Increasingly, the police services are “learning organizations” which retain and assess past experience to develop better planning and training.

The APEC Inquiry was an important catalyst in the evolution of public order policing in Canada. That inquiry was called in response to numerous allegations of wrongdoing by the RCMP and the federal government at the Asia Pacific Economic Cooperation (APEC) Conference held in Vancouver in 1997. The inquiry considered fifty-two complaints related to how the RCMP treated demonstrators at the conference, including allegations of the use of excessive force to suppress and disperse peaceful protesters. Further allegations related to flaws in planning for the event, the role of government officials, and the structure of command.

In his report, Mr. Justice Ted Hughes identified errors by the RCMP in the planning and execution of security arrangements for the APEC meeting, including command structures, role separation, training, legal support, and record-keeping. He found that the conduct of RCMP officers was inappropriate to the circumstances and violated the fundamental freedoms of protesters guaranteed under section two of the *Charter of Rights and Freedoms*. His recommendations addressed operational arrangements for public order policing and broad principles of RCMP policy on relations with the government. For example, he recommended that, in the planning stages for public order events, minutes should be taken for meetings between police and senior federal officials, and that, where that does not occur, the police should record the business transacted in a memorandum to file.

The RCMP accepted most of the recommendations, and accepted that the organization had made errors and had failed to prepare properly for the APEC meeting. The RCMP also officially adopted five principles, which Justice Hughes set out in his report, to guide the force in relations with government in the course of public order policing. I discuss the APEC Inquiry recommendations on police/government relations in chapter 12.

9.2.2 “Measured Response” and Contemporary Policing Strategies to Reduce Violence

Since the APEC Inquiry, there have been considerable changes in public order policing in Canada. Commentators often refer to the G8 Summit held in

Kananaskis, Alberta in June 2002 as an example of the new approach. These changes influenced the OPP approach to recent policy and operational initiatives with respect to policing Aboriginal occupations and protests.

The RCMP and other police services at Kananaskis made a deliberate effort to develop mutually supportive networks with protesters by encouraging mutually beneficial communications between police, demonstrators, and local business/community constituencies. The police made an explicit effort to “institutionalize” protesters by offering them the opportunity to achieve their protest objectives so long as they adhered to an agreed-upon plan which included no violence and which set restrictions on the protesters’ movements.

The police response ranged from the low key, accessible approach of the members of the Major Event Liaison Team (MELT) who greeted demonstrators on arrival, to the paramilitary units who secured the summit meeting site.

From a policing perspective, the policing strategy at Kananaskis was successful: Even though approximately 2,500 demonstrators took part, there was no significant physical violence, negligible property damage, and only one arrest.

The RCMP describes its new public order strategy as “measured response.”

According to Professor de Lint, the measured response philosophy is based on “unbiased and respectful treatment of people, accountability, mutual problem solving, and building bridges/lines of communication.”⁵ The measured response philosophy is also based on the belief that violence is to be scrupulously avoided, and it cautions against strict enforcement of the law if the result would be greater risk to public safety.⁶

Measured response now guides the approach to public order events in Canadian policing. Canadian police actively seek to reduce the risk of violence and interact with protesters in an open-handed fashion. Wayne Wawryk’s background paper for the Inquiry described how police move up the continuum of force when no other choice is available and return to “open handed methods” as soon as conditions permit.⁷ Measured response is, therefore, consistent with sections 25–27 of the *Criminal Code of Canada* (and the related case law), which address the degree of force that police officers can lawfully use.⁸

Closely allied with measured response is the concept of “intelligence-led policing.” This concept emerged in the 1990s as a strategy for how intelligence-gathering should inform and guide police decision-making. It reflects the crucial relationship between intelligence gathering, public order policing, and the measured response philosophy. “Intelligence-led policing” directs police decision-makers to seek accurate intelligence, at every stage, to give them the information they need to identify options, establish priorities, and make decisions.

The “Gold-Silver-Bronze” model of incident command is a final significant

operational change in the policing of public order events, which many Canadian police services have adopted. In this approach, the single incident commander is replaced by up to three, as necessary. The benefit of the Gold-Silver-Bronze approach is said to be that it allows the front-line incident commander to be on site in order to observe the incident directly. Other commanders, at the command post or at a further remove, supply resources or establish the overall policing strategy. The Gold-Silver-Bronze structure thus allows senior officers to establish strategy and provide perspective while not interfering with the role of the front-line commander.

The OPP told the Inquiry that it has adopted all key elements of the measured response strategy in its own public order policing strategy.⁹ For example, the OPP cited the need for an open-door policy toward protest groups. This allows the OPP to meet and communicate with protesters well in advance of a planned public order event with a view to achieving their mutual objectives in a way that avoids unnecessary confrontation. Incremental application of force, according to the OPP, now forms an integral part of the training of OPP officers, including Emergency Response Team members, incident commanders, and Public Order Unit commanders. The OPP has also adopted the Gold-Silver-Bronze structure.

9.3 The Uniqueness of Aboriginal Occupations and Protests

Aboriginal occupations and protests can range from small, brief incidents, largely unnoticed, to large events that draw hundreds of people and attract intense media coverage. The police response varies accordingly.

In general terms, Aboriginal protests and occupations undoubtedly mirror many of the characteristics and dynamics of non-Aboriginal public order events such as labour disputes or political protests. Yet the history, law, dynamics, and complexity of Aboriginal protests also distinguish them from non-Aboriginal protests and occupations in ways that require dedicated and unique police resources, strategies, and responses.

First and foremost, the subject matter, legal context, and history of Aboriginal protests are different from labour or political disputes. The roots of Aboriginal protests typically originate in the failure by mainstream society to address treaty and Aboriginal rights over decades, if not centuries. Moreover, Aboriginal rights are protected in the Constitution. On this basis alone, Aboriginal occupations and protests are qualitatively different than most other kinds of single issue, one-time protests or occupations.

A second distinguishing feature of Aboriginal occupations and protests is the difficult history of relations between police and Aboriginal peoples. That

history and experience may make it hard to establish trust between police and Aboriginal people meeting in situations where Aboriginal people are asserting rights through direct action.

Third, the location of Aboriginal protests and occupations tends to be different. Aboriginal protests typically occur in areas remote from urban centres. Unlike other kinds of public order events, Northern Ontario is an area of significant — and perhaps growing — Aboriginal occupations and protests. Protests and occupations will also often take place off-reserve on “traditional lands” held by the Crown or by non-Aboriginals. Protests in these locations occur outside the boundaries of the First Nation and outside the jurisdiction of the local First Nation police service.

Fourth, the participants in Aboriginal occupations and protests are different. Aboriginal occupations and protests sometimes involve people and organizations outside the First Nation and Aboriginal community. The provincial and federal governments, municipalities, the media, non-Aboriginal third parties, and/or several police services or other enforcement agencies may also be involved. Occupations and protests may also involve Aboriginal communities that are divided internally, even when the protest is focused externally. Or the protesting group may have a contingent of outside members or members who reject the police role in principle. This can make it difficult for police to communicate with occupiers/protesters and for governments to negotiate the issues in dispute.

Fifth, the behaviour of Aboriginal occupiers and protesters is different, and they often respond differently to police tactics. A crowd of rowdy hockey fans, for example, can generally be expected to disperse when confronted by the police. Aboriginal occupiers may feel “at home” on their territory and push back forcefully or return with supporters if police intervene to end the occupation.

Sixth, the potential duration of Aboriginal occupations and protests distinguishes them from most public order events. Many Aboriginal protests span days, weeks, or longer periods.

Seventh, the role of governments in Aboriginal occupations and protests is often very different from their role in most public order events. Aboriginal protests and occupations may require intervention by both the federal and provincial governments because they very often raise public policy and legal issues beyond the authority of police services and the scope of public order policing.

Finally, unlike most other kinds of protests or occupations, solidarity blockades are common. Almost a quarter of Aboriginal protests reported in the news media in some years were in support of protests by other groups.¹⁰ This is an indication of Aboriginal solidarity, and it also shows the significant disruptive potential of Aboriginal occupations and protests. Solidarity blockades can be national in scope.

Fortunately, police services across Canada have recognized the unique character of Aboriginal occupations and protests.¹¹ For example, the OPP *Framework for Police Preparedness for Aboriginal Critical Incidents* defines these incidents as

[an] incident where the source of conflict may stem from assertions associated with Aboriginal or treaty rights, e.g., colour of right, a demonstration in support of a land claim, a blockade of a transportation route, an occupation of local government buildings, municipal premises, provincial/ federal premises or First Nation buildings.¹²

9.4 Best Practices to Reduce Violence

9.4.1 Policing to Reduce Violence

As noted above, the uniqueness of Aboriginal protests means that policing them requires dedicated and unique resources, training, strategy, and management.

I was fortunate to have the benefit of the original and significant research conducted for the Inquiry by Professor Don Clairmont and retired RCMP Inspector Jim Potts. Their background paper contributed significantly to my analysis and to my understanding of how to reduce the risk of violence in Ipperwash-like situations. Over the course of their research, Professor Clairmont and Inspector Potts interviewed more than 100 police, protesters, non-Aboriginal and First Nation government representatives, and others, to identify best practices and strategies to reduce violence. They also demonstrated the application of best practices in five case studies:

- The Red Hill Valley occupation (Hamilton, Ontario, 2002) was a lengthy, urban occupation by members of the Six Nations of the Grand River to oppose highway construction which threatened possible burial grounds and archaeological sites.
- During the Day of Rage at Akwesasne (Ontario, 2001), in concert with protests at the Summit of the Americas in Quebec City, a coalition calling itself “Traditional Mohawks and Anarchists” attempted to hold a mass march across the International Bridge, disregarding customs and immigration checks.
- The Norway House shooting (Manitoba, 2005) led to unrest over whether the police shooting of a young Aboriginal man would be properly investigated by police authorities.

- The South West Nova fishing protest (Nova Scotia, 1999) was a dispute over Aboriginal and non-Aboriginal rights in the lobster fishery.
- Aboriginal occupations and protests in the Lower Mainland of British Columbia (2002-2006).¹³

Professor Clairmont and Inspector Potts concluded that the potential for violence is reduced if police strive to build a network of mutual support or interdependence between police and protesters in order to promote trusting relationships that encourage and facilitate peaceful negotiations. At the same time, police should strive to effectively “institutionalize” conflict in order to reduce the risk of violence and also contribute to a legacy of relationships of trust and mutual support between police and protesters.

I heard overwhelming support for this approach—in our research papers, consultations, submissions from parties, and from witnesses who commented on this subject in the evidentiary hearings.

9.4.2 Police Strategy and Discretion

Best practices in policing to reduce the risk of violence must begin with a dedicated strategy that includes the following elements:

- Understanding and respecting the history, traditions, culture, and claims of Aboriginal protesters
- Listening, communicating, and negotiating honestly
- Trying to develop a network of mutual support linking occupiers with the police and anyone else who may be affected by the dispute
- Being patient, and emphasizing communication at every turn
- Remaining neutral as to the substance of the dispute
- Building trusting relationships with protesters, First Nation communities, and others involved in an occupation and protest
- Committing to minimizing the use of force, and to escalating the use of force only to prevent harm to persons or serious property damage
- Involving First Nation police officers/police services
- Maintaining public order

The police must also develop tactics designed to keep public order, but not to eliminate blockades—except where there has been physical harm to persons or significant property destruction. The five case studies presented by Professor

Clairmont and Inspector Potts demonstrated how the police used these tactics to reduce the risk of violence in each case. Police officers and First Nation protesters both supported this approach.

Perhaps the most important best practice in policing Aboriginal protests is waiting, listening, and talking. Indeed, communication with non-policing authorities and protesters was the most significant police practice identified in our research and consultations. At Red Hill Valley, for example, police officers of all ranks mixed with protesters informally and “on their turf, respecting Aboriginal traditions as they understood them.” At the same time, Hamilton city officials were negotiating the underlying dispute with Confederacy representatives. In this manner, a network of mutual support was created between police, government officials, and protesters.¹⁴ However, this practice only works if police are forthright and honest in their dealings with protesters. Bad faith or dishonest communication destroys trust and negates the potential to resolve occupations and protests through building constructive, peaceful relationships.

Another best practice is to identify an appropriate person (such as an Elder or other person of stature) to meet with the protesters and act as a mediator. This may require a trial and error approach to identify the right person or persons.

It is also important that police recognize that protests include elements of pride and theatre. Police should recognize the effort, emotional commitment, and broader social implications of the actions of the participants and consider how the protesters could withdraw in a way that allows them to achieve some of their protest objectives and preserves their dignity.

The South West Nova case study is an interesting example of how best practices can be used strategically to both avoid violence and restore public order. By applying the measured response philosophy at South West Nova, the RCMP was able to keep the local wharfs open while resisting pressure from local harbour authorities to act forcefully against both Aboriginal and non-Aboriginal fishers. The RCMP response in South West Nova emphasized negotiation over strict enforcement of the law, clear communication of police options and “bottom lines” to all parties, treating all sides with sensitivity, and providing each side with a way out when it appeared that one or more parties was in a corner.¹⁵

A final best practice is strategic exercise of police discretion. Police discretion is fundamental to reducing the potential for violence at Aboriginal occupations and protests. Discretion may involve whether, when, or how enforcement action is taken to address alleged breaches of the law. This concept is easily misunderstood. It does not mean that anyone is above the law or that police services should have different standards for Aboriginal peoples. Nor does it mean that the rule of law and public order are somehow subservient to Aboriginal

interests. On the contrary, the strategic exercise of police discretion is a legitimate practice of police services across the country and in almost every area of law enforcement.

Police discretion allows police services to balance the often competing demands placed upon them and to decide, in appropriate circumstances, that it is wiser to delay the enforcement of a particular law or the laying of charges against specific persons in the larger interest of public safety or public order. For example, no reasonable person would suggest that the police should immediately execute an arrest warrant against a dangerous criminal if doing so would mean putting innocent bystanders at risk. Everyone would agree that the better approach would be for police to use their discretion to ensure that the arrest can be made safely. Police discretion at Aboriginal occupations and protests does not mean that law-breakers are never charged. It simply means that law-breakers should be charged when it is neither dangerous nor needlessly provocative to do so.

The Court of Appeal decision in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* in December 2006 commented extensively on the importance of police discretion:

There are cogent reasons why the courts ordinarily have no business interfering with or questioning how the police and the Crown exercise their discretion. Respect for the separation of powers and the rule of law depend on the courts not interfering.¹⁶

In the present case, for example, many considerations are at play beyond the obligation to enforce the law. These considerations include Aboriginal and treaty rights, constitutional rights, the right to lawful enjoyment of property, the right to lawful protest, concerns about public safety, and importantly, the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation.

The immediate enforcement and prosecution of violations of the law may not always be the wise course of action or the course of action that best serves the public interest.¹⁷

Police discretion must always be exercised within the law. It must also be exercised in a principled, consistent manner and with a view to larger, long-term police and societal objectives. In the context of an Aboriginal occupation or protest, I believe this means police must be certain to pursue protesters or others alleged to have committed serious offences.

9.4.3 *Institutional Policies, Resources, and Capacity*

Institutional best practices can also reduce the potential for violence. These best practices can include the following mechanisms:

- Protocols between police and other police services, First Nation governments or organizations, and/or other agencies involved in occupations and protests
- Organizational innovations such as specialized conflict negotiation teams
- Community-based Aboriginal policing
- Effective internal police training and supports for Aboriginal conflict resolution and peacekeeping
- Support for alternative dispute resolution within First Nation communities

The comprehensive organizational capacity in the RCMP to promote peaceful resolution of Aboriginal occupations and protests in the lower mainland of British Columbia is an organizational best practice of this type. Protocols are one element of the strategy. Other elements include designating special police roles for building trust and relationships between the RCMP and Aboriginal communities, secondments to facilitate communication and understanding between First Nations and regulatory agencies, and developing sophisticated conflict negotiation techniques to reduce tension at occupations and protests.

One notable RCMP innovation in British Columbia is the Aboriginal Community Constable Program (ACCP), which provides funding for community-based initiatives. The Aboriginal officer is assigned to one or more First Nations within the jurisdiction of the detachment. The officer is required to spend at least 80% of his or her time working in a First Nation, 30% of which is spent within the First Nation in active policing duties. The ACCP officer's role is to be a conduit, conveying the concerns, interests, and viewpoints of Aboriginal peoples and RCMP detachment officers to one another. In these ways, "the officer presumably is establishing trust and the web of mutual support between police and native peoples that is so crucial to successful, non-violent occupations and protests."¹⁸

Another best practice which is crucial for promoting peaceful resolution to Aboriginal protests is the hiring and promotion of First Nation officers and support for First Nation police services. An Aboriginal RCMP sergeant, in his role as RCMP First Nation liaison to Aboriginal communities in Manitoba, successfully mediated the Norway House conflict. At Akwesasne, the chief of the Akwesasne Police Service led the strategy to deter hundreds of protesters from converging on the community. He forged a community consensus among council

chiefs, traditional leaders, and warriors using the Internet and other technology to communicate to potential protesters the strong feelings in Akwesasne against its being the site of such an occupation and protest.

Finally, community-based policing itself is an important best practice in reducing violence. Generally, community-based policing is a style in which police activities focus on community engagement in policing and joint problem-solving, where police consult with local communities about priorities and take the input into account in their daily work.¹⁹

Professor Clairmont and Inspector Potts commented on this style of policing:

Many police officers interviewed for this project, in different regions and different types of police services, indicated that the best way to deal with the problem of occupations and protests in aboriginal communities is to have effective community-based policing in the first place. The latter, it was held, effects an integrated reactive and proactive policing style that can “institutionalize” occupations and protests whereby ... police and protestors know and trust one another and can collaborate to achieve peaceful yet effective occupations and protests from the protestors’ standpoint.²⁰

Although I have focused primarily on the policing response, I am aware that the goals, strategies, and methods of the protesters asserting Aboriginal rights also affect the risk of violence. The Chippewas of Nawash Unceded First Nation provided the Inquiry with a valuable report, which gathered together best practices for the Crown and for Aboriginal peoples in instances when Aboriginal peoples assert their rights through either negotiation or direct action.²¹

9.4.4 Peacekeeping and the Limits of Policing

The practical and legal realities of Aboriginal occupations and protests place special demands on the police. On the one hand, the police will always have the duty to preserve and restore public order. This means that the police must do their best to prevent the occupation or blockade from escalating into violence. It also means that the police have an obligation to respect and protect the right of local non-Aboriginal residents to enjoy their property peacefully and to live in their communities as normally as possible. On the other hand, the police have an obligation to respect the constitutionally protected rights of protesters and the unique treaty and Aboriginal rights of Aboriginal protesters. Police also must bear in mind that they do not have the mandate or ability to settle a dispute about treaty or Aboriginal rights.

Balancing these competing priorities is not easy, but the best practices I have discussed so far have proven successful in balancing them in such a way as to reduce the potential for violence at Ipperwash-like occupations and protests. The best practices also make it clear that the most appropriate role for the police in these situations is to restore and maintain order so that parties themselves are able to negotiate a solution to their dispute.

Taking all this together, I believe that police services should adopt the following objectives when policing Aboriginal occupations and protests:

- Minimize the risk of violence at occupations and protests
- Preserve and restore public order
- Facilitate the exercise of constitutionally protected rights
- Remain neutral as to the underlying grievance or assertion of rights
- Facilitate the building of trusting relationships which will assist Aboriginal and non-Aboriginal parties to resolve the dispute constructively

Collectively, these responsibilities are often called “peacekeeping,” and I use the term in that sense. However, peacekeeping is a complicated concept, and the term can have different meanings, depending on the context. In Aboriginal communities, for example, the peacekeeping role can extend far beyond policing. Moreover, peacekeeping responsibilities vary from First Nation to First Nation.²²

Peacekeeping has the potential to balance the different interests that come together in an Aboriginal occupation. The role of the police is to facilitate conflict negotiation in order to restore order temporarily, not to reach a solution to the underlying dispute. Thus, the primary police objective should not be to dissolve the occupation or blockade but to keep the peace. To be successful, peacekeeping must be informed by a full and balanced appreciation of the legal rights and societal interests at stake. This means that the policing of occupations and protests should not be carried out in a one-sided way, which, in effect, denies the validity of the rights claimed by the occupiers. Officers directing and carrying out the policing of Aboriginal occupations must understand that an important element in the rule of law, which they aim to uphold, are rights that Aboriginal peoples enjoy through treaties with Great Britain and Canada or through recognition in the Constitution. Moreover, so long as the protest is peaceful, it may be a legitimate, constitutionally protected form of political expression.

The practical limitation of peacekeeping is that, in most situations, the police cannot deal with the substance of the Aboriginal grievance that led to the protest in the first place. This limitation creates an important dilemma for the police, because there are obvious limits to what they can negotiate. The police are not

responsible for land claims, resource development policy, or other substantive issues that may be the catalyst for an occupation or protest. However, the success of the police operation often depends on whether other parties, including the provincial and federal governments and First Nations or Aboriginal communities, take steps to address the issue in dispute. Inaction by these parties, or actions inconsistent with police strategy and tactics, may complicate or prolong the policing of occupations and protests.

9.5 The Ontario Provincial Police

9.5.1 Description of the OPP

The OPP is the police service in Ontario most likely to be involved in an Aboriginal occupation or protest that calls for a police response. This will likely remain the case for the foreseeable future, even if the role of First Nation self-administered police services is expanded significantly.

The OPP is the largest police service in Canada, after the RCMP. It employs about 5,500 uniformed officers and 1,800 civilian members, plus 800 auxiliary officers.²³ Under the *Ontario Police Services Act*, the Lieutenant Governor in Council (that is, the Cabinet) appoints the commissioner of the OPP. The commissioner exercises general control and administration of the OPP, subject to the direction of the Minister of Community Safety and Correctional Services (formerly known as the Solicitor-General).

The *Police Services Act* sets requirements for the OPP, as it does for municipal police services. Both must provide “adequate and effective services,” such as crime prevention, law enforcement, assistance to victims of crime, maintaining public order, and emergency response. The OPP has a specific mandate, which includes providing policing in parts of the province that do not have municipal police services. It is responsible for policing on all navigable bodies of water (except within municipalities), traffic patrol on most highways, and investigative services to assist municipal police as requested.

The OPP polices twenty First Nations directly, and supervises policing in nineteen others.

9.5.2 “Aboriginal Initiatives: Building Respectful Relationships”

OPP participation in Part 2 of the Inquiry highlighted the diversity and depth of OPP programs and policies to promote relationship-building with Aboriginal communities. These issues were the subject of extensive OPP submissions and materials. In addition, the OPP provided further details in its two-day presentation

to the Inquiry in January 2006, entitled “Aboriginal Initiatives: Building Respectful Relationships.”

The OPP presentation described existing initiatives intended, in whole or in part, to promote relationships with Aboriginal peoples:

- The OPP Promise
- Focus on Professionalism
- Mission Critical Issues
- Business Planning
- Commissioner’s Select Liaison Council on Aboriginal Affairs
- OPP Youth Summer Camp
- Police Ethnic and Cultural Exchange (PEACE)
- Aboriginal outreach initiatives, including OPP Bound and OPP Northern Experience
- Aboriginal inreach initiatives, including Emergency Services Bound
- Support for First Nation police services, including the Nishnawbe-Aski Police Services (NAPS) Investigative Support Unit and the Integrated Support Services Unit (ISSU)
- Native Awareness Training
- Aboriginal-specific promotion criteria
- The Aboriginal Liaison Operations Officer
- Regional Aboriginal Strategy Committees
- Aboriginal Relations Teams (ART)
- Framework for Police Preparedness for Aboriginal Critical Incidents
- Crisis negotiator program enhancements
- Aboriginal officers leadership forum
- Zhowski Miingan — Traditional Aboriginal Drum²⁴

I discuss several major OPP initiatives in this chapter and in chapters 10 and 11. Most of these programs and policies were initiated after Ipperwash.

9.5.3 *The OPP Framework for Aboriginal Critical Incidents*

The Framework is one element of a comprehensive OPP strategy to improve the policing of Aboriginal occupations and protests. Other notable components include the Commissioner's Select Liaison Council on Aboriginal Affairs, Aboriginal Relations Teams (ART), improved training, and improved intelligence and public order procedures.

The Framework sets out a broad policy structure for policing a wide range of Aboriginal critical incidents. It is an operational policy, intended to guide incident commanders and officers before, during, and after such incidents. Given the importance of the Framework to the OPP strategy for policing Aboriginal occupations and protests, I will describe it in some detail.

The opening statement of the Framework sets out the intent of the OPP to safeguard constitutional rights:

The OPP is committed to safeguarding the individual rights enshrined within Federal and Provincial laws, inclusive of those specifically respecting the rights of Aboriginal persons of Canada as set out in the Canadian Charter of Rights and Freedoms. The OPP recognizes that conflicts may arise as Aboriginal communities and the various levels of government work to resolve outstanding issues associated with matters such as land claims, self-determination and Aboriginal or treaty rights, which may relate to education, hunting and fishing. It is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved parties throughout the cycle of conflict.²⁵

The stated purposes of the Framework are as follows:

- Promote an operationally sound, informed and flexible approach to resolving conflict and managing crisis in a consistent manner;
- Offer a Framework that demonstrates accommodation and mutual respect of differences, positions and interests of the involved Aboriginal community and the OPP; and
- To promote and develop strategies that minimize the use of force to the fullest extent possible.

A definition of "Aboriginal critical incident" indicates when the Framework will be applied:

The Framework can be applied before, during and after any Aboriginal

related critical incident where the source of conflict may stem from assertions associated with Aboriginal or treaty rights, e.g. colour of right, a demonstration in support of a land claim, a blockade of a transportation route, an occupation of local government buildings, municipal premises, provincial/federal premises or First Nation buildings.

This is a broad definition, suggesting that the Framework is intended to be adaptable to a broad range of incidents, not only to Aboriginal occupations and protests.

A number of organizational resources support the Framework, including the Aboriginal Liaison Operations Officer (ALOO), the Aboriginal Relations Teams (ART), and the Critical Incident Mediator (CIM).

The ALOO is an OPP officer reporting to the Office of the Commissioner. The officer's mandate includes fostering trusting relationships between the OPP and Aboriginal communities, keeping up to date on Aboriginal issues, assisting in facilitating communications during any Aboriginal incident, and advising the OPP senior management and incident commanders regarding Aboriginal issues.

Currently, there are approximately forty ART officers. Their goal is to facilitate communications during any Aboriginal "dispute, conflict or incident." They "provide specialized support and assistance in the spirit of partnership in building respectful relations between police services and Aboriginal peoples and communities while honouring each one's uniqueness and the Creator's gifts with dignity and respect."

The CIM meets with Aboriginal representatives during an incident and communicates "police interests." His or her role is to identify key issues on the Aboriginal side and develop, with the incident commander, a "mutually acceptable resolution strategy."

The Framework sets out what to look for at each stage of an incident, and what can be done. For example, before an incident, the Framework calls for OPP officers to take the following steps:

- Remain informed of issues of concern by participating in discussions with First Nation Councils (as defined by the Indian Act), First Nations police, community members/groups, other levels of Aboriginal leadership, etc.;
- Ensure ART members/First Nations liaison officer are linked into such discussions or are kept informed of the content;
- Be open, talk to all parties;
- Develop and display respect for all concerned by listening;

- Build positive trusting relationships with members of the community, First Nations police officers and other agencies;
- Review the local emergency plan to see if it adequately addresses potentially conflicting situations, e.g. plan outlines diversion routes, identifies likely blockade locations;
- Contact elected and traditional leaders of the community if an issue arises that may precipitate a dispute or conflict.

The pre-incident phase is critical to the Framework, as former OPP Commissioner Gwen Boniface testified:

With the Framework, what we attempted to establish is really to have emphasis around the proactive, the pre-critical incident, and the work that we would start and work ... with one goal in mind, and that's to get to a peaceful resolution of the issues. The contacts that would be made at the front end, the relationships that establish, and as they work their way through the incident it would be weighing all those things as you go.²⁶

The Framework notes that “persons—who may include leaders—from the Aboriginal community may look for police personnel who have Aboriginal ancestry to assist as a point of communication.” It specifies that “negotiations will be used at every opportunity.” The OPP is required to “communicate to disputants that all demonstrators and other members of the public will be treated with dignity and respect.”

The Framework directs the OPP to set out the roles of all its participating elements, including First Nations police officers, local OPP personnel, and specialized units such as ART, CIM, and the Emergency Response Team (ERT).

Interestingly, the Framework requires OPP officers to “establish with disputants a means by which information and progress will be communicated to media.” Officers are also directed to acknowledge the existence of the dispute within the critical incident and to reacquaint themselves “with cultural values particular to that First Nation community.” Officers must “consider the impact on member safety and that of the demonstrators and other members of the public as decisions are made.” Communication with all parties is stressed repeatedly.

With respect to the post-incident stage, the Framework points to the fact that “persons in dispute are emotionally and physically exhausted.” They may, however, “want to reflect on what has just occurred” and discuss the lessons learned or even identify “peace-building actions.” It sets out what can be done, including steps such as the following:

- Involve, where applicable, ART members or First Nations liaison officers as a culturally appropriate conflict resolution strategy;
- Maintain through the ART members or First Nation liaison officer, a continued OPP presence which can respond immediately to local community questions or concerns relating to the role either local detachment personnel or emergency management services performed during the critical incident;
- Encourage a non-confrontational meeting to discuss with the disputants the lessons learned from the crisis;
- Facilitate a session where police and parties in conflict can establish an action plan that addresses the damage done during the dispute or crisis;
- Consider who needs to be involved in the operational review, when best to conduct the review and where.

9.5.4 Implementation of the Framework

The OPP submits that it applied the principles of the Framework for several years before formally adopting them as policy in early 2006. The OPP considers the Framework to be successful, and plans to expand the resources devoted to it, for example by doubling the number of ART officers (from forty to eighty). The OPP has been applying the Framework at Caledonia.

To ensure that the Framework is applied throughout the province, the OPP designated it a “critical policy;” that is, a policy determined to be of extreme importance to OPP employees from an operational perspective. Two separate monitoring processes are in place, as described by the OPP:

- The Manager of Emergency Management and Planning, Field Support Bureau chairs the Provincial ART Strategy Committee that teleconferences weekly. This forum is used to share information about ongoing and potential incidents. The Framework is at the centre of every discussion and the chair of the committee monitors its use;
- Incidents assessed to be high-risk are under the command of a Level 2 Incident Commander. There is a mandatory operational review of every Level 2 Incident by a member of the L2 IC Review Committee, which is made up of four Commissioned Officers including the Field Support Bureau Commander, Incident Command Program Manager, Lead Level 2 Incident Commander Instructor and one Regional Senior Level 2 Incident Commander. If the incident has involved a First Nations community or

Aboriginal subject, the Framework is one of the areas reviewed to ensure that the Incident Commander worked within the policy.

The monitoring techniques are intended to identify and circulate improvements in the program.

The OPP advised the Inquiry that the Framework is used to train Level 2 incident commanders, which is the level required for Aboriginal critical incidents.

According to the OPP, training police officers in all the elements of the Framework is critically important if the concepts are to be embedded in policing practice. The OPP stated that understanding and respect for the history, traditions, culture and claims of Aboriginal protesters are the “centrepiece of the OPP strategy, not only in relation to occupations or protests, but generally.”²⁷ The most important training program in this regard is the introduction of Native Awareness Training for applicants, recruits and recruiters, probationary officers, regular officers, specialty teams, intelligence personnel, members of the Professional Standards Bureau, and incident commanders.

The OPP added that its training program also supports its commitment to minimizing the use of force, a central element of policing strategy to reduce the risk of violence. The “Gradual Application of Force” now forms an integral part of the training of OPP members, including the ERT, incident commanders, and POU commanders.

Finally, the OPP made several refinements to the Framework in response to comments made at Part 2 events. The improvements included adding a definition of critical incident, training all OPP detachment commanders on the Framework, disseminating the Framework to First Nation police services, and having ongoing discussions to define the role for local First Nation police services at incidents on and off First Nation communities. The OPP has also committed to training public order unit (POU) commanders and ERT members on the special considerations and unique responses involved in an Aboriginal blockade, occupation, or land dispute.

9.6 Assessing the Framework

I support the measured response philosophy and the need for police services to retain considerable discretion as to how and when to enforce the law in the course of Aboriginal occupations and protests. These are best practices, demonstrated to reduce the risk of violence in Ipperwash-like situations across the country.

The Framework may seem unconventional or even extraordinary to anyone who is not familiar with current policing strategy and tactics. The text of the Framework is more facilitative and cooperative and less enforcement-oriented

than a layperson might expect in a policing policy. For example, the Framework does not mention what happens if someone breaks the law. Nevertheless, the Framework is a policing policy and strategy document and should be interpreted as such. It embeds the core principles of contemporary public order policing strategy, including institutionalizing protests, implementing measured response, exercising police discretion to avoid violence, and emphasizing intelligence-led policing. Terms like “intelligence collection” or “information-gathering” are never mentioned in the Framework, but these concepts are implicit throughout.

According to the OPP, “it remains of critical importance” that the Inquiry identify its Aboriginal initiatives as best practices and that I support them in my recommendations.²⁸ In their view, this would help ensure that government supports these initiatives financially and that other police services and agencies consider them as they develop their own practices. It would also further the goal of public education about police/Aboriginal relations. The OPP also stressed the importance of educating the public about best practices, and especially about the legitimacy of police assuming the role of peacekeepers, particularly in light of the considerable public criticism the OPP has received for its policing in Caledonia.

Subject to my comments below, I do consider the Framework, the Aboriginal Relations Teams, and related programs best practices. These initiatives conform to the best practices I have already identified, including practices promoting respect for Aboriginal and treaty rights, measured response, a network of mutual support, communication and negotiations with protesters, and neutrality as to the issues in dispute. Furthermore, I commend the OPP for taking a leadership role and for demonstrating its commitment to learning the lessons of Ipperwash. The sophistication of these efforts and the commitment to them in the organization are impressive.

However, there are several emerging challenges to the progress the OPP has made on these initiatives. The OPP could also take a number of steps to test or improve their effectiveness. The first set of issues can be called “sustainability” issues. The second can be called “effectiveness” issues.

9.6.1 Sustainability

The Framework and its related programs are impressive, but an important challenge to their sustainability is that they are still quite new. It may simply be too soon to tell whether these initiatives have become fully embedded in OPP culture and operations.

Another sustainability challenge is a very human one: At present, there are only about 135 self-identified Aboriginal members among the approximately 5,500 uniformed members of the OPP.²⁹ This important but small group of

officers no doubt carries a significant weight of responsibility for the design, implementation, and public expectations of these initiatives. These officers do not carry this burden exclusively, but they nonetheless carry a disproportionately heavy weight both within the OPP and in their communities. The Inquiry repeatedly heard of the many challenges facing them. By way of contrast, more than 1,200 of the roughly 18,000 members of the RCMP report some Aboriginal ancestry,³⁰ proportionately many more than in the OPP. To be successful, the OPP initiatives will require a wide and deep institutional and personal commitment on the part of many non-Aboriginal members of the OPP, including a commitment to hiring and promoting more Aboriginal officers.

The sustainability of the Framework also depends on financial resources. The financial and personal cost of implementing the Framework during a single occupation that could last for many months can be overwhelming. The provincial government recently estimated the policing cost related to Caledonia, up to the end of October 2006, at \$15 million.³¹ Moreover, it is not clear if or how the OPP could sustain the Framework in two or more Caledonia-like incidents simultaneously.

Finally, the philosophical approach embedded in the Framework has been under intense and critical scrutiny at Caledonia. Events there have raised important questions about whether the Framework can be sustained in the face of considerable opposition from a sizeable proportion of local non-Aboriginal residents, criticism from members of the provincial legislature and the media, apparent opposition within the rank and file of the OPP, and the sheer endurance and resources necessary to sustain this approach over many months.

Some Aboriginal parties at the Inquiry praised the OPP for its peacekeeping role at Caledonia in 2006, among them the Nishnawbe-Aski Police Services:

The recent road blockade at Caledonia demonstrates how peacekeeping can work. Peacekeeping is about finding solutions to contributing problems. The Ontario Provincial Police maintained order and ensured safety for the public at large and for the occupiers. The police do not have the answers to problems but in the case of Caledonia, the police become instrumental in facilitating opportunities for dialogue and eventual negotiations.³²

In my view, the Framework and its associated programs should not be dependent on the outcome of Caledonia. I believe that this approach is already proven to be a best practice and should not stand or fall on the basis of one, albeit significant, protest. Nevertheless, an incident like Caledonia raises important political, financial, and operational questions about the sustainability of this approach, whether it is a best practice or not.

The OPP response to the sustainability challenge is essentially four-fold:

First, the OPP submits that the breadth and depth of commitment to these initiatives among OPP officers and within OPP policies and procedures means that a move to back away from them will be resisted.

Second, the OPP submits that the federal and provincial governments should promote public education on Aboriginal rights and each should improve its capacity to resolve land claims in an effective and timely way. This would promote public understanding of Aboriginal issues, dispel the notion that Aboriginal claims are presumptively unwarranted, and promote more tolerance of measured, flexible policing responses.

Third, the OPP states that the provincial government should institute a policy on injunctions that complements the Framework approach and sets out factors to consider in applying for or supporting injunctive relief at court, such as the existence of Aboriginal claims and whether the applications will contribute to a peaceful resolution of the incident.

Finally, the OPP recommends that the provincial government allocate funds to support Aboriginal initiatives within the OPP.

There is considerable merit in the OPP position. However, these measures, important as they are, may be insufficient. In the end, the Framework and its associated programs must rest on a more secure foundation if they are to be sustained.

9.6.2 Effectiveness

The relationship between the sustainability of a program and its effectiveness is crucial. The best reason to sustain any policy or program is that it is effective. Or to put it another way, programs do not deserve to be sustained if they do not work. Therefore, the sustainability of the OPP initiatives depends, in no small part, on whether the OPP can demonstrate that these policies and programs are effective at achieving their objectives.

In my view, there are four primary strategies that should be undertaken by the OPP to test or enhance the effectiveness of the Framework:

- Enhanced evaluation strategies
- Improved transparency and accountability
- Improved community consultations
- Sustained efforts to maintain and restore relationships after an Aboriginal occupation

Later in this chapter, I discuss the strategies which the provincial government should implement to support the Framework.

9.6.2.1 Evaluations

Effectiveness is tested and proven through evaluations. Indeed, evaluations are crucial tools in program development and management. Methods of evaluation include questionnaires or surveys, key informant interviews, focus groups, community consultations, advisory committees, performance measures, and independent, third-party program evaluations. Not all evaluations need be statistical or quantifiable. Consultations, interviews, focus groups, and community forums are also important techniques in learning about the effectiveness of a program or policy. In many cases, this type of evaluation will be sufficient. When it is not, qualitative methods of evaluation should be supplemented properly, with appropriate data collection and/or independent, third-party program evaluations.

Independent evaluations are particularly important for foundational, complex, or expensive programs. Programs like the Framework and the ART are exactly the kind that would benefit from an independent, third-party evaluation. Both programs are crucial to the OPP strategy for policing Aboriginal occupations and protests.

The Chiefs of Ontario recommended that “[a]t the post-critical incident stage a method to evaluate the operations of this policy [the Framework] is necessary and must include the OPP ... and First Nation leadership to ensure ongoing success.” Former OPP Commissioner Boniface, in her testimony at the Inquiry, agreed that input and guidance from the First Nation leadership on developing assessment tools would be welcome. The OPP said that it is prepared to work with the First Nation leadership to develop additional assessment tools to add to the input currently received from the Commissioner’s Select Liaison Council on Aboriginal Affairs.

Amnesty International also commented on the need for independent evaluation:

The Framework includes a number of significant structural reforms, including the establishment of an Aboriginal Relations Team and calling for the deployment of a Critical Incident Mediator in the event of a confrontation. It is not clear, however, how well the new direction signalled by this Framework has been institutionalized and acculturated within the OPP and its many structures and large force of officers. Indeed, as signalled by recent events at Caledonia, there is an urgent need for an independent evaluation of this Framework and its implementation.³³

In my view, the need for an independent evaluation is the next obvious step in the implementation of the Framework and the ART program to date. I believe, therefore, that both the Framework and the ART program should be subject to independent, third-party evaluations. I further believe that these evaluations should include significant and meaningful participation by Aboriginal representatives in the design, oversight, and analysis of the evaluation.

9.6.2.2 Accountability and Transparency

The credibility and legitimacy of public institutions depend on the perception that politicians and public servants, including the police, are accountable. Accountability and transparency can also do much to restore and build relationships after a conflict.

As a general rule, I believe that the police must be as accountable for the policing of Aboriginal occupations and protests as they are for any other kind of police work. I also believe that the reaction of many Ontarians to the policing at Caledonia demonstrates the need to reinforce the OPP strategy for policing Aboriginal occupations and protests with transparent and publicly accessible policies and with explanations for police decision-making. Ontarians need to be assured that police strategy, tactics, and decision-making on Aboriginal occupations and protests is principled, consistent, and within the boundaries of the law.

Individuals responsible for policing occupations and protests can be held accountable both internally and publicly. Internal accountability is concerned with compliance with organizational policies and procedures, the law, and applicable professional standards. Public accountability is concerned with submitting actions and policies to scrutiny by the community at large.

The OPP described its internal accountability process for the Inquiry. In the first instance, internal accountability depends on procedures for keeping detailed records of incidents.³⁴ Mandatory reviews of Level 2 and Aboriginal critical incidents are a central feature of internal accountability with respect to Aboriginal critical incidents.³⁵ The Framework also specifically addresses post-incident operational reviews.

In assessing accountability, especially accountability inside an organization, I believe one has to ask whether it is working in practice. Assuming that the appropriate procedures and rules are in place, the next step is to audit actual compliance, and then to determine whether the organization takes action to fix areas of weakness or resistance.

The Inquiry did not hear evidence about how well internal accountability is working within the OPP in the area of policing Aboriginal occupations and protests; however, the Auditor-General of Ontario recently audited the OPP and

made several comments that may be relevant to this issue. The focus of the Auditor-General's report was on the implementation of community-oriented policing in the OPP and related efforts at quality assurance:

There was little evidence that the objectives of community-oriented policing were being met...and no minimum requirements had been established to guide detachments ... Also, there were no internal measures in place to evaluate the effectiveness of community-oriented policing.³⁶

...

The OPP's three quality assurance processes ... were not implemented fully and on schedule. The objectives of the quality assurance function might be better met through another process that is less administratively cumbersome, with appropriate follow-up procedures for ensuring that corrective action is taken.³⁷

The Auditor-General also commented, in passing, on the role of the Ministry of Community Safety and Correctional Services in overseeing the OPP. The internal audit services at the ministry "had not conducted any substantial work at the OPP in the last four years."³⁸

Internal accountability is fundamentally important in enabling the OPP to evaluate, update, and disseminate its experiences with policing occupations. Record-keeping and other internal accountability mechanisms will also be crucial evidence of police activities and decision-making in the event of a public inquiry, a request under the *Freedom of Information and Protection of Privacy Act*, civil litigation, or Special Investigations Unit (SIU) investigation. For all of these reasons, the OPP must maintain the highest standards of internal accountability procedures and processes. Yet, the Auditor-General's report raises concerns that the OPP and the ministry have some distance to go towards making internal accountability work in practice.

Internal accountability, of course, is only one half of the equation. Police services like the OPP are accountable to the public by way of legislative committees, public complaints processes, civil lawsuits, criminal prosecutions, freedom of information requests, SIU investigations, public inquiries, and coroner's inquests, to name a few. In general, most of the proceedings, rulings, and reports arising from these processes are public. OPP policies, including the Framework, police orders, First Nation policing protocols, and so on, are also public documents.

The intention in making documents public is to enhance public accountability. Public accountability is best achieved, however, if public documents are both

public and accessible. The OPP no doubt circulates public documents to members of the public upon request, but this is not the same as making them publicly accessible. I believe that all significant OPP and provincial government documents and policies on the policing of Aboriginal occupations and protests should be posted on the OPP website. The terms of reference for any third-party evaluations and interim and final results, should be posted also.³⁹

Public accountability can also be enhanced significantly by publishing reports on major police events or activities. For example, Caledonia has generated significant public interest and discussion about policing philosophy and tactics. Unfortunately, it is not clear whether the provincial government or the OPP intend to issue a detailed, public report describing their decision-making and strategy for this incident. Aboriginal Legal Services of Toronto repeated a common view regarding Caledonia: it was hard to judge the actions of the OPP in the absence of more information.⁴⁰

Canadian police services lag behind their British counterparts in promoting public accountability for major public order events and for policing generally. In Canada, the only public reports on public order policing, generally available and easily accessible to the public, are reports of commissions of inquiry or institutions like the Commission for Public Complaints Against the RCMP. In the United Kingdom, Her Majesty's Inspectorate of Constabulary (HMIC), an independent institution now 150 years old, is responsible for examining and improving the efficiency of police services in England and Wales. HMIC publishes reports of its audits of police services, which include comprehensive assessments known as "baseline assessments" and reviews of "best value" reports on specific programs. For example, in 2003, HMIC reviewed the City of London police report on public order policing and gave the service a "fair" rating.⁴¹

The British HMIC model of self-review and central oversight, with strong public accountability, is in harmony with the principles I put forward in this report. In my view, the OPP has an opportunity to take the lead in promoting public accountability in public order policing. The OPP could take a step in this direction by carrying out regular, formal reviews of its responses to Aboriginal occupations and protests, and publishing the results. A public report on policing at Caledonia might be a good place to start.⁴²

9.6.3 Consultation and Public Education

9.6.3.1 Aboriginal Communities

The OPP program of consultation with Aboriginal communities regarding occupations and protests can be divided into two categories. The first comprises consultation or liaison activities with local Aboriginal communities before,

during, and after an actual occupation or protest. This is primarily the responsibility of the Aboriginal Liaison Operations Officer and ART members or First Nation liaison officers. The second category comprises regular, ongoing consultations with First Nation leadership and organizations. Key initiatives and forums in this regard include the following:

- Commissioner's Select Liaison Council on Aboriginal Affairs
- Commissioner's meetings with elected chiefs, the Chiefs of Ontario, and the Provincial Territorial Organizations
- Senior regional command meetings with leaders of First Nations and Provincial Territorial Organizations
- Detachment commanders are required to meet regularly with local First Nation police services and local elected leaders
- Regional Aboriginal Strategy Committees

The Commissioner's Select Liaison Council on Aboriginal Affairs appears to be a crucial component of the OPP strategy for consultation with the Aboriginal community. The Committee is made up of a small number of experienced Aboriginal persons from across the province. They provide direct input to the commissioner on matters of importance to the OPP with respect to policing and Aboriginal people. The OPP is hoping to establish regional liaison councils which might perform the same role in the various regions policed by the OPP.

The Select Liaison Council on Aboriginal Affairs is an example of an ongoing, expert consultation forum. I heard that it provides important advice and support to OPP management and operational commanders. This council appears to have had a particularly strong relationship with former Commissioner Boniface.

I believe, however, that the OPP should also establish a more formal consultation forum or relationship with major Aboriginal political organizations in Ontario. Potential members of this forum could include the Chiefs of Ontario, the Métis Nation of Ontario, and the Provincial Territorial Organizations. In my view, a more formal, representative consultation forum is justified in order to ensure that Aboriginal input into the OPP is more broadly based, politically representative, and transparent than the Select Liaison Council can provide. The two bodies will complement each other if the mandate of the new committee is carefully developed.

9.6.3.2 Non-Aboriginal Communities

As noted earlier, I believe that the reaction of many Ontarians to the OPP policing at Caledonia demonstrates the need to reinforce the OPP strategy for policing

Aboriginal occupations and protests. Transparent and publicly accessible policies and explanations of police decision-making are crucial.

In its Part 2 submission, the OPP reflected on the nature of some of the opposition in Caledonia:

[T]his opposition is sometimes deeply offensive, and at times hateful and racist. Intemperate opposition often obtains a disproportionate voice in the media. It may be articulated, for example, in stereotypes about Aboriginal peoples and the assertion of their rights. Intemperate, aggressive, hateful or racist expressions inflame any incident, make its peaceful resolution more difficult, and leave scars in the community not easily healed.⁴³ This may be true. Nevertheless, it is also true that reasonable people can and do disagree with the OPP policies and tactics for policing Aboriginal occupations and protests, both on principle and because of the disruption to their personal lives.

The anger and resentment that these local and personal disruptions can generate should not be underestimated. For example, the Mercier Bridge was the scene of a violent Aboriginal/non-Aboriginal confrontation during the Oka standoff in 1990. Members of the Kahnawake reserve erected a blockade on the bridge to show support for the Oka protesters. The blockade effectively closed the only local road carrying commuters from the south shore of the St. Lawrence to Montreal. The occupation at Caledonia has also generated significant and at times violent counterdemonstrations by members of the local non-Aboriginal community.

In my view, the OPP should, as a matter of policy, make efforts to consult with the local non-Aboriginal community during an Aboriginal occupation or protest. Consultation and liaison with non-Aboriginal community members is particularly important for community members whose lives or businesses may be disrupted. This commitment would be a welcome complement to the very appropriate commitment to consult and liaise with local Aboriginal communities before, during, and after an actual occupation or protest.

The OPP received intense criticism from the local non-Aboriginal communities at both Ipperwash and Caledonia. In both cases, they criticized the OPP for failing to provide them with important or current information about police activities which affected local residents. I am also aware, however, that the OPP has made efforts to consult with non-Aboriginal people in the Caledonia region.

In its submission, the Municipality of Lambton Shores addressed the question of how best to facilitate this kind of communication and liaison, particularly during a crisis:

Direct and timely communications between the Incident Commander and the Municipality is essential during a crisis situation. The relationship between an Incident Commander and the Municipality is one of mutual benefit. The Municipality provides important information regarding the concerns of the community, which assists in intelligence gathering and in providing information to assist police in strategizing for operational decisions. The Municipality is equally dependent on receiving timely and direct information from the Incident Commander to allay the concerns of their community and defuse tensions. This is a relationship of co-dependency.⁴⁴

Former Commissioner Gwen Boniface agreed that the OPP should communicate with local elected officials, who could then act as a conduit to the public. She also agreed that this type of communication is appropriate and often necessary to permit the OPP to manage incidents of community interest effectively.⁴⁵

The submission from the municipality was very helpful, and I agree that the proper channels for consultations and liaison are municipal or local officials, as opposed to a specially constituted local liaison committee. My only qualification to the position of the municipality is that the OPP should communicate with municipalities through a dedicated liaison officer, not through the incident commander.

The OPP should address these issues by developing a consultation and liaison policy for the non-Aboriginal communities which may be affected by an Aboriginal occupation or protest. This policy should specify how the OPP and a municipality or local officials can best work together to support the peacekeeping objectives, improve timely and accurate public information and understanding of policing activities, and reduce the potential disruption that may accompany an occupation or protest. This policy should be developed in consultation with local communities and should be distributed to local officials and posted on the OPP website.

9.6.4 Restoring Relationships

In the period after an incident, participants and police have the time and opportunity to restore relationships. For example, the Framework directs the OPP to hold a session where police and parties in conflict can establish a plan to address the damage done during the dispute or crisis. The OPP also undertakes to maintain a continued OPP presence which can respond to community questions or concerns relating to the role of local OPP members or emergency management services during the incident.

It is also important to restore relationships and trust with the non-Aboriginal community affected. Community meetings may be appropriate for the non-Aboriginal community also.

The OPP advised the Inquiry that it is preparing a plan for restoring relationships in the Caledonia region. According to the OPP, the plan must involve, at a minimum, dialogue between the OPP, the communities affected, and stakeholders. The OPP reports that it is consulting with various community leaders to develop this plan.

The Framework specifically addresses strategies to restore relationships after a critical incident is over. It suggests that, at this stage, “persons in dispute are emotionally and physically exhausted,” and that parties “may deny the existence of a dispute or crisis” or “may want to reflect on what has just occurred and want to discuss the lessons learned and identify peace-building actions.” The following are some of the steps outlined:

- Involve, where applicable, ART members or First Nations liaison officers as a culturally appropriate conflict resolution strategy;
- Maintain through the ART members or First Nations liaison officer, a continued OPP presence which can respond immediately to local community questions or concerns relating to the role either local detachment personnel or emergency management services performed during the critical incident;
- Encourage a non-confrontational meeting to discuss with the disputants the lessons learned from the crisis;
- Consider who needs to be involved as well as who can best represent the OPP; and
- Facilitate a session where police and parties in conflict can establish an action plan that addresses the damage done during the dispute or crisis.

In my view, the OPP should develop a strategy to restore relationships with both Aboriginal and non-Aboriginal communities after an Aboriginal occupation or protest. This strategy should establish general objectives, responsibilities, and potential activities for restoring relationships, and should be adapted in practice to specific circumstances as necessary. The provincial, federal, and/or municipal governments should support and participate in this strategy as appropriate. This policy should be distributed to relevant parties and should be posted on the OPP website.

9.7 Provincial Government Policy Leadership

9.7.1 Provincial Leadership and Policy-Setting Role

Governments and police share responsibility for responding to Aboriginal occupations and protests. In this section, I comment on the leadership role of the federal and provincial governments before and during an Aboriginal occupation or protest.

The Ministry of Community Safety and Correctional Services (MCSCS), formerly the Ministry of the Solicitor General, administers the *Police Service Act*. The “Declaration of Principles” in the first section of the *Act* states the following:

- (a) Police services shall be provided throughout Ontario in accordance with the following principles:
 1. The need to ensure the safety and security of all persons and property in Ontario.
 2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
 3. The need for co-operation between the providers of police services and the communities they serve.
 4. The importance of respect for victims of crime and understanding of their needs.
 5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.
 6. The need to ensure that police forces are representative of the communities they serve.

Section 3(2) of the *Act* gives the ministry the authority to

- (a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels ... ;
- (d) develop and promote programs to enhance professional police practices, standards and training;

- (e) conduct a system of inspection and review of police forces across Ontario ... ;
- (h) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;
- (j) issue directives and guidelines respecting policy matters ... ;
- (k) develop and promote programs for community-oriented police services.⁴⁶

The Policing Services Division of MCSCS is responsible for the ongoing development and improvement of policing throughout the province. The ministry website describes its role as follows:

By providing effective training, professional standards and policies, systematic inspections and reviews, and advisory support to police services, the ministry ensures that a world-class law enforcement network protects Ontario.

Finally, the Policing Standards Section of the ministry develops regulations and guidelines designed to

- Ensure adequate and effective police service across Ontario
- Support the implementation of professional police practices

These sections of the *Act* and excerpts from the ministry website establish the leadership role of the ministry in policing in Ontario. The ministry has the explicit responsibility, mandate, and authority to make policy regarding policing services in this province. The *Act* allows the government to set policy objectives for policing and to establish rules or guidelines which formalize government expectations. This authority includes the power to establish best practices for policing, including policing Aboriginal occupations and protests. With respect to the OPP, the minister has even more authority, including the power to direct the OPP commissioner.⁴⁷ MCSCS also funds the OPP directly. This means that the provincial government, through MCSCS, is directly responsible and accountable to all Ontarians for the success of the OPP and its initiatives.

I believe that the provincial government can reduce the risk of violence in Ipperwash-like situations by demonstrating policy leadership through a forward-looking strategy to promote best-practices throughout Ontario for Aboriginal occupations and protests.

I recommend that the Minister of Community Safety and Correctional Services

issue a ministerial directive supporting the general purposes and practices of the OPP Framework. I further recommend that the directive should apply to all Ontario police services, but allow for adaptation to local circumstances. In line with the ministry's usual practice, the ministry should audit compliance with the directive by the police services. I believe that this measure would achieve a number of objectives.

First, I believe that the OPP Framework is good policing policy. It is a best practice for responding to the assertion of rights by Aboriginal peoples. Moreover, the OPP will not always be the police service called upon to respond to these incidents. The province should therefore exercise its policy-setting prerogative and ensure that the Framework is applied consistently throughout the province. This will ensure that the services charged with policing Aboriginal occupations and protests acknowledge the constitutional and legal status of Aboriginal and treaty rights, promote respect for Aboriginal cultures, and, as the Framework states, "demonstrate accommodation and mutual respect" and "minimize the use of force."

Second, a ministerial directive would help to embed and sustain the Framework in the OPP and other police services by raising the Framework to the level of a provincial policy.

Third, a ministerial directive would promote transparency and accountability in the OPP and in provincial government policing policy because it would establish public expectations about how both institutions should respond. Deviations from or amendments to those policies will have to be explained publicly.

Fourth, this approach would promote best practices, clarity, and consistent action within the provincial government. The provincial government often has to become involved in Aboriginal occupations and protests in order to resolve them peacefully. A ministerial directive based on the Framework would publicly confirm the strategy, expectations, and accountability of the provincial government in its own response to Aboriginal occupations and protests. The policy would also promote consistency throughout the provincial government, because it would apply to MNR and other provincial agencies that are occasionally involved in policing Aboriginal occupations and protests.

Finally, a ministerial directive would codify the lessons learned at Ipperwash and reassure Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be the last resort.

It will no doubt be argued that a ministerial directive and provincial policy of this nature will limit or restrict the power of police and/or provincial govern-

ments to act unilaterally. In my view, that is the strength of this approach, not its weakness. Police and government policies on Aboriginal occupations and protests should be consistent, and it should be difficult for either of them to act unilaterally when important principles and personal safety may be at stake.

This approach does not limit police discretion or the ability of governments to make policy decisions about Aboriginal occupations and protests. On the contrary, it provides a transparent, principled framework for exercising that discretion. This approach will also enhance the legitimacy of police and government actions if and when coercive force is necessary.

No one can say whether Ipperwash would have turned out differently if provincial policies of this type had been in place in 1995. However, policies like this will compel provincial or police officials who wished to pursue a more aggressive policing response in the future to explain publicly why peacekeeping is inappropriate. It will also be considerably more difficult for a provincial official to demand that protesters leave a site within a limited time period or to downplay the importance of negotiations. Police leaders, incident commanders, and individual officers will also have additional assurance that peacekeeping is the appropriate and justified strategy, irrespective of any real or perceived governmental pressure otherwise.

In my view, the provincial peacekeeping policy should be based largely on the OPP Framework. The Framework is consistent with best practices identified around the country and it was reviewed and commented upon, at least in part, by several First Nation organizations during the course of the Inquiry. This policy should be adopted as soon as it is practical to do so. That would achieve the benefits of this policy quickly, and it would address one of the lessons of Ipperwash in a timely manner. The Ministry of Community Safety and Correctional Services should then initiate an appropriate consultation process with First Nations, Aboriginal peoples, the OPP, other police services, and others regarding the scope and content of a longer-term provincial policy.

9.7.2 Provincial Funding

As noted above, the provincial government recently asked the federal government for reimbursement of the policing costs incurred at Caledonia. There will no doubt always be unexpected incidents that put extraordinary pressures on the operational or program budget of the OPP. The province, the OPP, and other stakeholders need to develop means of funding these contingencies, including seeking participation by the federal government in appropriate circumstances. I discuss provincial funding for the OPP Aboriginal initiatives in chapter 11.

9.7.3 Injunctions

Injunctions have proven to be very controversial in Aboriginal occupations and protests.⁴⁸ The decision as to whether to seek an injunction, or what kind of injunction to seek, was discussed at length in the days leading up to Dudley George's death at Ipperwash. Injunctions have also been discussed at length at Caledonia. The injunction issue is important to this Inquiry because of the effect an injunction can have on the course of an Aboriginal occupation.

9.7.3.1 *The Caledonia Injunction Proceedings*

The occupation at Caledonia has focused considerable public attention on the issue of police discretion and enforcing injunctions.

As I discussed in chapter 2, in March 2006, Henco Industries obtained an interim injunction from a judge of the Ontario Superior Court requiring the Caledonia protesters to vacate the property. The court subsequently found that persons named and unnamed who did not leave the property were in criminal contempt for breaches of the injunction.

The injunction order and contempt proceedings were the first steps in an unusual series of legal proceedings, over the summer and fall of 2006, in which the motions judge held several hearings to ask the provincial government and the OPP why they had not upheld his injunction and contempt orders. At one point, the motions judge commented from the bench that the Six Nations, Ontario, and Canada should stop their negotiations until the blockades were lifted. The provincial government and the OPP eventually appealed the injunction and the contempt orders to the Court of Appeal of Ontario.

The Court of Appeal decision in *Henco* dismissed most of the lower court orders and commented extensively on the propriety of judicial intervention in police operations and discretion.⁴⁹ Speaking for the Court, Justice Laskin stated that

[o]ur courts have long recognized that the effectiveness of our justice system depends on the police's operational discretion in investigating and enforcing violations of the law and the Crown's discretion in prosecuting these violations. Apart from instances of flagrant impropriety or civil actions for malicious prosecution, courts should not interfere with either police or prosecutorial discretion.⁵⁰

In this kind of case, the police and the Crown, not the court, are in the best position to assess whether a serious breach of the injunction has occurred, and if so, by whom. And even if the injunction has been

breached, the police and the Crown must invariably balance many competing rights and obligations and must take account of many considerations beyond the knowledge and expertise of the judge.⁵¹

The Court also found that the motions judge's comments to the effect that the parties should stop their negotiations until the blockades were lifted "were unfortunate and at odds with the Supreme Court of Canada's jurisprudence."⁵²

The Court of Appeal decision in *Henco* is consistent with the thrust of this report. Aboriginal occupations and protests raise many complex and competing interests and should not be approached as a simple matter of enforcing the law. Even with respect to law enforcement, there should be due deference to the discretion of the police.

9.7.3.2 *The OPP Policy on Injunctions*

In 1995, the OPP presumed that Aboriginal occupations should necessarily be addressed through the injunction process. Prior incidents had been resolved successfully through the court process, often by using the injunction order to negotiate an end to the incident.⁵³

The OPP no longer believes that an injunction should be sought in every Aboriginal occupation or protest, now taking the view that in some circumstances, applications for injunctive relief, the timing of such applications, or the terms of any injunctive relief "may not ultimately advance public safety and order, but may exacerbate tensions and actually inhibit the expeditious and peaceful resolution of the issues."⁵⁴

The current OPP policy on injunctions is "more nuanced than it was in 1995."⁵⁵ The OPP submitted that it needs flexibility when policing Aboriginal occupations and protests. The Framework therefore does not mention injunctions.⁵⁶

In my view, the substance of the OPP injunction policy is correct. It is consistent with the Framework and the general principles and analysis set out in this report. I suggest that it would be preferable, however, to amend the Framework to incorporate the OPP policy on injunctions. This would enhance public understanding of the OPP injunction policy as well as OPP internal training on it.

9.7.3.3 *A Government Policy on Injunctions?*

The provincial government does not appear to have a written policy on when or how it will seek an injunction during an Aboriginal occupation, nor on how it will react to an injunction sought by a third party. In all likelihood, this position

is based on a belief that a written injunction policy is not necessary because existing legal conventions governing injunctions are both well known and appropriate.

Several parties to the Inquiry recommended that the province go further. For example, the Chippewas of Kettle and Stony Point First Nation recommended adding consideration of Aboriginal and treaty rights and the duty of the government to consult to the factors to be considered by a court in the case of an injunction application involving an Aboriginal protest or dispute.⁵⁷ The OPP suggested that consideration of Aboriginal and treaty rights and the duty of the government to consult should “inform any government policy on applying for, or supporting injunctive relief, and ultimately inform a court decision when injunctive relief is sought.”⁵⁸

In his research paper for the Inquiry, Professor Wesley Pue discussed in detail the law and policy of trespass, expressive rights, and injunctions. He warned against simple generalizations about the legality of public protest generally and Aboriginal protests specifically, and concluded as follows:

Though few complications arise with respect to ordinary users of public property, constitutional considerations come into play as the use at issue moves from “ordinary” to expressive or from the realm of individual rights to aboriginal entitlement. Though each is relevant to the important balancing tasks that arise, none of ancillary police powers, the law of trespass, or the law of injunctions provides an easy “end-run” around the need for state authorities to respect both common law liberties and constitutionally protected rights.⁵⁹

I agree with Professor Pue, and accordingly I recommend that the provincial government adopt a policy on how to use injunctions in Aboriginal occupations and protests. A written provincial policy will help ensure that the use of injunctions is consistent with respect for Aboriginal rights and with the OPP peacekeeping approach to Aboriginal rights disputes. It will also promote transparency and accountability for the provincial government approach to injunctions.

The Attorney General will play an important role in any decision to seek an injunction or with respect to intervention by the province in any case in which a private party seeks an injunction. Although it is clear that the Attorney General enjoys independence from the Cabinet with respect to criminal prosecutions, there are competing views on the role of the Attorney General in non-criminal litigation. Some express the view that the Attorney General essentially takes instructions from the client department or the Cabinet, as would a lawyer in private practice. Others argue that the Attorney General has a special obligation to ensure

respect for the rule of law, including Aboriginal and treaty rights, in all litigation. When someone within government requests or supports an injunction, I would expect that the Attorney General would give his or her independent and frank views about the legal and constitutional implications of seeking an injunction. The Attorney General's views on such matters should not be lightly discarded by the client department, or indeed by the Cabinet. Moreover, I would not rule out the possibility that the Attorney General might assert his or her independence if the matter was of constitutional significance, such as in the case of fiduciary duties including the duty to consult.⁶⁰

I further believe that the provincial government should be represented whenever private landowners seek injunctions and Aboriginal and treaty rights may be at issue. In these circumstances, the provincial government should inform the court that Aboriginal and treaty rights are at stake, that the province has a duty to consult Aboriginal peoples, and that negotiations are the preferred response to Aboriginal rights disputes. The provincial government and/or the OPP should also advise the court of any public order implications and the potential risks of an injunction.

Finally, provincial policy should state that the province will consult with the OPP, or other police services as the case may be, on the potential effect of an injunction “on the ground” as regards the risk of violence. This is an example of a legitimate, if not essential, information exchange between police and government, which I discuss at length in chapter 12.

In my view, a provincial government injunction policy will go a long way to ensuring that the OPP and provincial government approaches to injunctions are consistent, accountable, publicly accessible, and supportive of the peacekeeping approach I recommend throughout this chapter.

9.7.3.4 Representation

I agree with the OPP that it may be advisable for it to be separately represented in injunction proceedings where the provincial government asserts a direct interest, such as when the provincial government is the landowner.⁶¹ This would enhance the appearance and reality of OPP independence in any claims dispute. The OPP should have the authority to determine on its own initiative whether to seek separate representation.

Sometimes, Aboriginal occupiers do not recognize the jurisdiction of the courts. Or, local non-Aboriginal residents may believe that the provincial government does not properly represent their interests. It is important that the interests of Aboriginal protesters and local residents be heard in court. In these situations, the provincial government should facilitate court-appointed counsel for these

parties if necessary. To its credit, the provincial government did just that in the Caledonia proceedings at the Court of Appeal.

9.8 The Provincial Government Response to an Occupation

9.8.1 Crisis Management

Ipperwash is an example of why crisis management is a poor way for governments to address treaty and Aboriginal rights disputes and why it is better to negotiate issues in a timely way. In my view, the policies I recommend in this report should decrease the number of occupations and protests. Clearly, it is best to avoid crises in the first place.

Nevertheless, there will always be crisis situations where the police are called upon to restore and maintain order. What is needed is a crisis management approach that reduces the potential for violence, reduces the breadth and duration of the crisis, lessens the disruption of local Aboriginal and non-Aboriginal communities as much as possible, and increases the possibility of constructive, negotiated solutions.

I believe that the policies and procedures I recommend will enable government and police leaders to manage Ipperwash-like crises much more effectively. For example, a public commitment by police to peacekeeping should reduce the potential for violence by reducing tension and anxiety at an occupation or protest. This, in turn, should help build relationships that make negotiated settlements and trusting relationships more likely. An equivalent commitment on the part of the provincial government would serve the same goals.

9.8.2 Provincial Readiness, Coordination, and Briefings

To respond to Aboriginal protests and occupations, an interministerial response, and indeed an intergovernmental response, will often be appropriate and necessary. This is because an occupation may raise complex issues that cut across ministerial lines and require a coordinated response from the provincial government. I am reluctant to recommend a specific form, structure, or committee composition for coordinating the response, because it will always depend on the specific context of the occupation.

The drawback to interministerial “blockade” committees is that they pose the risk of diffusing responsibility and accountability for decision-making during an occupation by blurring the lines of communication and authority. These committees must be organized carefully to ensure that its members respect the statutory authority of each ministry involved and the traditions of ministerial

accountability. In the policing context, this means that communications between the OPP and the provincial government must be channelled through the Ministry of Community Safety and Correctional Services, as contemplated by the *Police Service Act*.

Interministerial “blockade” committees must also be fully briefed on the appropriate roles and responsibilities of police and government (as discussed in chapter 12) and on existing provincial and police peacekeeping policies. The committee must also be briefed on general aspects of police strategy and objectives in policing Aboriginal occupations and protests, on the unique constitutional status of Aboriginal rights and claims, and on the constitutional right of peaceable assembly. Relevant ministers, ministerial staff, and other senior provincial officials should be briefed on these issues as well.

Briefings on these topics will help ensure that provincial government decision-makers are fully aware of the relevant policies and legal issues. This will help promote more consistent provincial decision-making and improved coordination within the provincial government, and it will reduce the risk of precipitous or poorly informed provincial decision-making.

9.8.3 *Negotiations*

The police cannot resolve or negotiate the issues underlying Aboriginal occupations and protests. That is the responsibility of government. Governments, therefore, have an important role to play in resolving Aboriginal occupations. For example, the willingness of protesters to suspend an occupation might sometimes depend on the willingness of the government to commit to negotiations in some fashion.

A government may be unwilling to negotiate substantive issues during an occupation, possibly because of concerns that it would encourage “queue-jumping” or that it would establish a precedent for future or current Aboriginal occupations and protests. A government may also consider that “lawlessness” would be rewarded if it agreed to negotiate. There are no simple answers to these concerns. The decision to negotiate will always depend on the context. In the past, governments have often refused, at least publicly, to negotiate substantive issues, while often agreeing to negotiate “process” issues.

A policy of not negotiating seems very likely to fail if it is applied in every circumstance. Many, if not most, Aboriginal occupations and protests are mounted in response to legitimate grievances that span decades. An occupation may be the means of last resort for a First Nation or Aboriginal community to draw public attention to generations of government inaction. Simply refusing to negotiate with an Aboriginal community or protesters denies the responsibility of the government for the origins of the dispute.

Just as importantly, an unwavering policy will, in many instances, effectively repudiate the peacekeeping efforts of the police. For peacekeeping to be successful, the police must remain neutral in the dispute and facilitate the conditions necessary to resolving the underlying issues. If the protesters are not confident that the government is taking their grievances seriously, the police may find it very difficult to convince them to leave the site peacefully. Tensions behind the barricades are likely to rise, trust between police and protesters may be shattered, and the network of mutual support, so important to reducing the risk of violence, may be broken. An unwavering policy may also incite strong but misplaced public criticism of the police for not being able to resolve the occupation.

The peacekeeping approach cannot be interpreted to mean that governments may avoid taking responsibility for the policing or resolution of an Aboriginal occupation or protest. Police and government share the responsibility to end protests peacefully, and the government cannot be a bystander.

I believe that the decision on whether to negotiate and when must always be made strategically. It will depend on several factors, including a realistic assessment of the strength of the claim asserted by the protesters, the risks to public safety, the willingness or capacity of the protesters or First Nation to negotiate, the likelihood of a constructive, peaceful, timely agreement, the social or economic disruption caused by the occupation, and a host of other factors that may only become apparent in the context of the actual occupation.

9.8.4 Public Education

Experience shows that the risk of violence at an Aboriginal occupation increases when the local non-Aboriginal population has little knowledge or understanding of the issues in dispute or when it is uninformed about the practical details of road closures, police checkpoints, and so on. When that is the case, the occupation may spark counter-demonstrations by local non-Aboriginal residents whose lives are disrupted by the occupation or the police response to it.

As noted in chapter 7, it would be ideal if education in public schools and public education provided the balanced information people need in order to understand why Aboriginal people feel that they have to assert their rights, occupy a site, or engage in a protest. Since we have not reached that ideal, I think it is imperative that all governments—federal, provincial, municipal, and First Nation—take an active role in informing the public about the Aboriginal and treaty rights at issue in a particular protest.

The history of the Chippewas of Nawash and their long effort for recognition of their commercial fishing rights illustrates the importance of public education and communication when Aboriginal peoples are asserting their rights:

In the early 1990s, when the Saugeen Ojibway Nations decided to pursue their claims and rights, it quickly became obvious that the legal path and the path of direct action must be supported by a communications strategy.

In addition to legal expertise, we hired a communications coordinator whose job it was to ensure the First Nations motives and actions were interpreted accurately in the media and were heard by residents of the area. The early communications campaign consisted of:

- Presentations by chiefs and councillors in elementary and high schools,
- Presentations to local service clubs and other organizations,
- A series of articles in a prominent local magazine (Bruce county marketplace),
- Videos and printed materials describing the claims and rights of the first nations people in the Bruce peninsula,
- Articles, media releases, letter to local and provincial newspaper,
- Building and maintaining a network of supporters locally and provincially.

In spite of an aggressive public education campaign, it became apparent that it was not enough to deal with the backlash to our fishing rights which reached a violent climax in 1995. It was clear that we had to deal more directly with the racism we felt was fuelling the backlash. By 1995 our communications took many forms:

- Public education,
- “Persuading” the legal system to do its job,
- Helping to persuade Ontario to negotiate a fishing agreement,
- Dealing forcefully with disinformation and racism.

We took on the task ourselves, of communicating our rights and claims and the reasons why we were asserting them because it was in our interest to do so. However, the job of reconciling Canadians to First Nations’ rights and claims must surely rest with the Crown. The recommendations of the Royal Commission on Aboriginal Peoples say as

much. However, and the RCAP reflects this, public education must not be done without at least an equal involvement with First Nations.⁶²

I believe that Aboriginal peoples have a responsibility to educate the broader public about why they feel it necessary to assert their rights through direct action. The Chippewas assumed that responsibility during their commercial fishing rights dispute.

The provincial government and the OPP share that responsibility as well. Aboriginal peoples should not be alone in trying to explain their rights to the public at a time when emotions are running high in both the Aboriginal and non-Aboriginal communities.

I commend the provincial government for promoting public education on the Caledonia dispute through the website of the Ontario Secretariat for Aboriginal Affairs. These pages include basic information about Six Nations, a “what’s new” section, an outline of what is happening in the Caledonia negotiations, the structure of these negotiations, upcoming events, frequently asked questions, information about road closures, and other information.⁶³ The province has also established a toll-free telephone line for requesting information. The hotline received more than 300 calls between April 28 and October 11, 2006.⁶⁴

In my view, the OPP also has an important responsibility to educate the public about the policing of Aboriginal occupations and protests. Many of the initiatives I recommend, including improved transparency in policing policies, will go a long way toward improving public education on these issues.

I recommend that the federal, provincial, municipal, and First Nation governments actively encourage public education and provide information during significant Aboriginal protests through websites, hotlines, community circulars, and public meetings. The OPP should also provide public education materials and information about its role, and updates tailored to the situation. The OPP efforts should be coordinated with the provincial and local governments to ensure consistency and to promote accessibility.

9.9 The Federal Government Response to an Occupation

The federal government is not constitutionally responsible for policing in Ontario, yet it plays a role relevant to policing Aboriginal protests. The federal government is constitutionally responsible for Aboriginal peoples and treaty and Aboriginal rights, and it also bears very heavy responsibility for the long delays and frustrations that have led Aboriginal peoples to mount occupations and protests. The extraordinary delay by the federal government in addressing the land issue at

Ipperwash, for example, contributed significantly to the frustration that led to the occupation of Ipperwash Provincial Park in September 1995. The responsibilities of the federal government are particularly clear in the case of pre-Confederation treaties in which the British Crown is the signatory. For these reasons, it will often be inappropriate for the federal government to disavow any responsibility for policing or resolving Aboriginal occupations and protests in Ontario.

The federal government could go a long way toward promoting peaceful resolutions of Aboriginal occupations and protests if it publicly committed to working with the provincial government to settle any underlying disputes. The federal government should generally assume the lead responsibility in negotiations when land claims are at stake.

9.10 Building Networks

Many of the best practices in policing Aboriginal occupations and protests are based on the ability of police to build networks of mutual support. For this reason, I believe that the OPP Framework should be adopted and integrated into the work of other potential participants in policing occupations and protests, including First Nation communities and police services, municipal police services, and government agencies with enforcement branches (notably the Ministry of Natural Resources).

It is very difficult to build a successful network when an Aboriginal occupation or protest is already in progress. The better approach is to try to create an atmosphere of communication, understanding, trust and collaboration before an occupation or protest begins. That network can then be relied upon during the occupation or protest to help everyone communicate more effectively.

9.10.1 RCMP/First Nations Protocols

The RCMP has adopted three creative protocols for building networks in this manner. In each case, the protocol helps the RCMP and other signatories to “institutionalize” potential (or actual) conflict by creating procedures that allow each party to communicate issues or concerns effectively. The protocols also create clear expectations about how each party will respond in the event that the protocol is activated. These protocols effectively build a network by committing each signatory to working together to address common issues.

The RCMP and Assembly of First Nations (AFN) signed the “Public Safety Cooperation Protocol between the Assembly of First Nations and Royal Canadian Mounted Police” in 2004. As agreed through the protocol, in the event of an actual or threatened serious occupation or protest, the AFN and RCMP will strike

a special group, drawn from lists advanced by both parties, which will meet with local officials and explore peaceful resolutions. The protocol also contemplates awareness training and other related collaborative programs.⁶⁵

The “Public Safety Cooperation Protocol” (the “Norway House Protocol”) was signed by the RCMP and the Southern Chiefs’ Organization, the Manitoba Keewatinowi Okimakanak, and the Assembly of Manitoba Chiefs in 2005. It establishes policies and procedures in the event that a First Nations person dies while in RCMP custody or during an arrest.

The third protocol was signed in 2004 by the RCMP in British Columbia, the federal Department of Fisheries and Oceans (DFO), and the BC Aboriginal Fisheries Commission representing the interests of Native fishers. Any of the signing parties can activate the protocol and thus set in motion a process for discussion and resolution of disputes. Of the three RCMP protocols, this one has been used the most often, and with apparent success.⁶⁶

Protocols also help to promote accountability and transparency in police/Aboriginal relations. For example, the Norway House protocol specifies that First Nations organizations in Manitoba will name individuals available to collaborate in RCMP-led investigations into incidents where the police are involved in the serious injury or death of a First Nations person. The protocol also commits the RCMP to appointing an Aboriginal RCMP member who will liaise directly with the family members affected and a designated representative who will be fully involved in the investigation.

9.10.2 *OPP/First Nations Protocols*

The OPP has not signed any protocols with First Nation organizations in Ontario equivalent to the RCMP protocols with the AFN and Manitoba First Nations.

The Chiefs of Ontario told the Inquiry that they believe protocols of this sort would be beneficial.⁶⁷ The OPP replied that it would be “highly receptive” if First Nation political organizations in Ontario (whether the Chiefs of Ontario or the Provincial Territorial Organizations) wished to explore operational or public safety protocols. Subsequently, the OPP advised the Inquiry that it was currently working with the Chiefs of Ontario and the Nishnawbe Aski Nation to develop communication/dialogue protocols. I support these efforts.

The OPP, the provincial government, First Nation political organizations, and other police services in Ontario should take steps to advance these initiatives. More specifically, the OPP and First Nation political organizations in Ontario should develop communication protocols to enhance direct dialogue and promote consultation.

9.10.3 *OPP/First Nations Police Services Protocols*

The OPP has agreed upon operational protocols with most of the nine First Nations police services in Ontario. The protocol between Nishnawbe-Aski Police Services (NAPS) and the OPP (June 2003) is a good example.⁶⁸ It is a “flexible, non-contractual, formal agreement for cooperation and professional liaison.” Its purpose is to ensure coordinated and effective delivery of police services where collective use of resources is required or requested, and to serve as a guide when a coordinated effort between the two police services is involved.

The protocol is a kind of memorandum of understanding, signed by the NAPS Chief of Police and the OPP Superintendents for the two northern regions of Ontario. It covers forty-three First Nations across the northern half of the province and sets out the jurisdiction of the respective services, including the authority of NAPS to enforce federal and provincial laws and to investigate offences in close proximity to First Nations. Generally, the protocol assigns to the OPP more serious occurrences and incidents such as unnatural death, armed robbery, abduction, gambling, weapons, and “any occurrence which has the potential to generate an adverse report in the news media.” The protocol does not specifically refer to public order incidents, occupations, and blockades. However, it does commit the OPP to providing specially trained units such as the Emergency Response Team (ERT), Canine Unit, and Tactics and Rescue Unit (TRU) if requested by NAPS. Other topics covered include financial arrangements, post-event trauma support for officers, training, facilities, and public complaints.

The Chiefs of Ontario submitted that additional protocols between the OPP and First Nations police services are needed to ensure that First Nations services are involved in responding to occupations and protests:

With a few exceptions, there is no formal collaboration amongst the police services when such collaboration is essential to peaceful resolution. At present, there are some field and management level relations between the OPP and First Nation police services but no special protocols exist.⁶⁹

According to the OPP, no additional operational protocols between the OPP and First Nation police services are necessary to improve the policing of Aboriginal occupations and protests. In their view, the complexities of policing occupations and protests in Ontario require the utmost flexibility in addressing specific incidents:

[E]xisting protocols provide flexibility within broad parameters. As witnessed during the OPP Incident Simulation, it is a well-established

best practice for the OPP to seek permission as part of a consultative process before deploying OPP resources on First Nations territories. Where incidents occur “off reserve”, there are a myriad of factors that inform the roles that will be played by the OPP and the First Nations police service in responding. For example, the First Nations police service may agree to assume temporary policing responsibilities for an area normally patrolled by the OPP as part of a negotiated process to defuse tensions. Six Nations Police Service has performed this role at Caledonia. Or the OPP will draw upon First Nations police service officers to facilitate discussions with particular interested parties. In summary, each incident invites consideration of what roles should be played by the OPP and the First Nations police service. The key to a successful approach is ongoing consultation with the First Nations police service.⁷⁰

I believe that, in most cases, it may be sufficient for the OPP and First Nations police services to plan for such incidents jointly and to include explicit references to occupations and protests in existing protocols. Where a more formal protocol would be useful, the parties should work together to develop it. (I return to this subject in chapter 10.)

9.10.4 Municipal Police Services

Municipal police services may also be called upon to respond to Aboriginal rights incidents. There have been many occupations in cities, such as the “Revenue Rez” occupation of Revenue Canada offices in Toronto and the Red Hill Valley dispute in Hamilton. Many Ontario towns and small cities (Kenora and Thunder Bay, for example) have significant Aboriginal populations. The police services in these areas may not be familiar with Aboriginal issues or may not have dedicated policies to address Aboriginal occupations and protests. Professor Clairmont and Inspector Potts therefore suggested a greater degree of planning, integration, and support between the OPP and other police services in the province.⁷¹

The OPP advised the Inquiry that it could support municipal or other police services in policing Aboriginal occupations and protests effectively, if requested to do so and subject to financial capability, in the following ways:

- Disseminating the Framework to municipal police services that provide front-line policing for First Nations communities (such as Durham and Sarnia) or which police communities with significant First Nations populations;

- Making its Native Awareness Training program available to such services. Officers have attended from Toronto, York, Durham, Peel, Hamilton, Brantford, London, Barrie, North Bay, Sudbury, Thunder Bay, Kenora, and Sturgeon Falls. Specialty training (such as ART/MELT) could also be made available to other services; and
- Providing support, on request, from OPP specialty teams, such as ART, MELT, and Crisis Negotiation. This could extend from deployment of OPP resources to consultation.⁷²

I believe that the OPP should commit itself to these initiatives. I also believe that the provincial government, the OPP, and representatives from municipal police services should work together to develop resources or background materials that may be beneficial to a municipal police service in the event that they are called upon to police Aboriginal occupations and protests. Together, these efforts would promote better policing of Aboriginal occupations and protests throughout the province and help to make operative my recommendation regarding a provincial directive to all police services in Ontario. The Red Hill Valley dispute is a good example of how a municipal police service, in this case the Hamilton Police Service, can successfully implement best practices for policing Aboriginal occupations and protests with the support and assistance of the provincial police service.

9.10.5 The Ministry of Natural Resources

Aboriginal occupations and protests in Ontario often involve other provincial enforcement agencies, most notably the Ministry of Natural Resources. In these cases, police services sometimes play an important moderating and liaison role.

Many of the police officers surveyed identified a need to communicate to other provincial agencies what Professor Clairmont and Inspector Potts described as the “less-partisan nature of the police role.” Police officers contended that agency officials sometimes pressured them to take action rather than wait out the occupation or protest.⁷³ The RCMP now has an inspector-level liaison with the federal Department of Fisheries and Oceans and First Nations in the lower mainland of BC. This officer is a conduit between the parties, provides support and advice for DFO enforcement activities, and consults with First Nations in BC.

There is no protocol between the OPP and the Ministry of Natural Resources. According to the OPP, MNR is the ministry most often involved in Aboriginal occupations or protests as an interested party. The OPP told the Inquiry that it would welcome the opportunity to work with the MNR on an operational protocol consistent with the approach and best practices described in the OPP

Framework and suggested that MNR consider adopting the principles set out in the Framework.

With regard to the concern expressed by some police officers that other agencies misunderstand the less-partisan nature of the police role, the OPP suggested that this should be addressed through training at those agencies, along with a provincial government policy compatible with and supportive of the Framework approach. I agree.

At present, there does not appear to be a demonstrated need for a protocol with ministries or agencies other than MNR.

9.11 Dispute Resolution within First Nations

As I have already noted, a great many Aboriginal occupations and protests take place within First Nation communities themselves. Professor Clairmont and Inspector Potts reported on the policing of these disputes:

Intra-band occupations and protests in stand-alone jurisdictions have been frequent — especially at election time — though precise numbers are unavailable in part because of their short duration. Intra-band occupations and protests with a potential to expand beyond the First Nation are also not uncommon in areas where there is on-going challenge to the existing police service ... Intra-band occupations and protests in drive-in First Nation communities in Northern Ontario policed by a stand alone [police service], have often elicited police intervention but, reportedly, for the most part, been resolved by police exercising a calming, monitoring style of response.⁷⁴

They recommended that resources be allocated to increase the capacity for alternative dispute resolution within First Nation communities to prevent occupations and protests and also to reduce the potential for violence if and when they occur.⁷⁵ The OPP supported this view.

On the one hand, there would seem to be a natural fit between the objective of supporting dispute resolution within First Nation communities and the objective of enhancing the capacity of First Nation police services. For example, the OPP currently offers crisis negotiator training to First Nation police services. The First Nation police officers who complete the training and gain experience through working with the OPP could provide support for dispute resolution in First Nation communities. On the other hand, it is important to make a distinction between conflict negotiation and alternative dispute resolution (ADR). ADR programs are not a responsibility of police services, First Nations or otherwise.

I support the OPP effort to provide crisis negotiator training to First Nation police services and other efforts to increase the dispute resolution capacity within First Nations, but ADR initiatives should logically come from First Nations themselves. First Nations should consider the potential of ADR initiatives and consider developing proposals for federal or provincial funding. I support such proposals in principle.

9.12 *News Media*

Most Ontarians learn about what happened at Aboriginal occupations and protests, and why it happened, from the media.

The government and the police provide information to the media about the details of Aboriginal protests and give their perspectives on the background to them. How the media covers and conveys that information is and should be beyond the control of governments and the police. The independence of journalists is fundamental to their role in Canadian society.

Aboriginal Legal Services of Toronto (ALST) commissioned Professor John Miller of Ryerson University to study the news coverage of the Ipperwash incident.⁷⁶

Professor Miller based his analysis on the following principles proposed by the US-based Project for Excellence in Journalism:

- Journalism's first obligation is the truth;
- Its first loyalty is to citizens;
- Its essence is a discipline of verification;
- It must provide a forum for public criticism and compromise;
- It must strive to make the significant interesting and relevant;
- It must keep the news comprehensive and proportional.⁷⁷

Professor Miller also compared the media coverage of Ipperwash with the conventions for covering conflict situations adopted by the International Federation of Journalists. His study eventually analyzed almost 500 print articles from nineteen Canadian daily newspapers, *Macleans* magazine, and four wire services for the approximate period from August to October 1995.

One of Professor Miller's first observations was that no reporters were present on the night of Dudley George's death. Thus there was no independent account of the shooting by a media representative.

Professor Miller's study revealed other key findings:

Articles about Ipperwash framed the story in three ways: Aboriginal peoples as “troublemakers” (41% before the shooting, 48% after); Aboriginal peoples with a legitimate land claim issue (25% before, 31% after); and Aboriginal peoples with an internal dispute (33% before, 21% after).

- Many stories referred to other Aboriginal disputes, such as Oka or Gustafsen Lake (31% before, 42% after). Professor Miller said that these comparisons had a damaging effect on public opinion.
- Nine stories before the shooting and forty-two stories after it reported that the occupiers had guns.
- There was almost no reporting of the September 13, 1995 announcement by the federal government that documents existed which supported the presence of burial grounds at Ipperwash.
- Most of the news stories immediately after the shooting gave priority to the OPP account of the incident.
- Few reporters appreciated the internal dispute within the Kettle and Stony Point First Nation. The occupiers were described as a “splinter group” or as “rebels.”
- “Warriors” were reported to be in the military base and park, but no reporter ever talked to one or defined the term.
- Only three of ninety-two opinion pieces were written by journalists who actually visited Ipperwash.

Professor Miller ultimately concluded that the “news coverage of Ipperwash performed a public service by bringing to light an alternative view of events that challenged the OPP’s statements that the occupiers fired first and police were acting in self-defence.” However, he criticized reporters generally for not giving enough credence to the occupiers and his study suggested that reporters tend to favour official sources if there are conflicting accounts.⁷⁸

Interestingly, in commenting on the experience at Caledonia, the OPP largely supported Professor Miller’s analysis:

[T]he OPP has witnessed the intemperate opposition to the OPP measured response at Caledonia given a disproportionate voice (often through anonymous sources) in the media ... This makes the peaceful resolution of Aboriginal disputes more difficult. It inflames antagonists from all sides, and makes the healing process in the aftermath of a dispute much more difficult. The failure of the media to give equal

voice to the basis for Aboriginal claims also makes resolution and acceptance of substantive negotiations by the non-Aboriginal public more difficult.⁷⁹

ALST recommended that the provincial and federal governments “provide funding to bring together schools of journalism, journalists, editors, academics, and the Aboriginal community to establish best practices for reporting on Aboriginal peoples, and Aboriginal issues.”⁸⁰

I support the general objective of this proposal. However, I believe that it would be more effective if such an initiative were initiated and supported by major media organizations and/or journalism schools.

Wayne Wawryk’s research paper for the Inquiry recommended that only official police media relations officers provide information to the media, and that all such information “should be authorized by the commander of the operation, be attributed, and be updated on his/her authority.”⁸¹

Mr. Wawryk called on police to make special efforts to keep the surrounding community informed about what is likely to happen and how individuals can arrange their lives to cope. He pointed to the connection between police intelligence and information communicated to the media. With reliable intelligence as source material, incident commanders are in a better position to provide correct information.

In what is now, I believe, general OPP practice, information during an incident flows from police to reporters through a designated media officer, with the authorization of the incident commander. In my view, the police should ensure that they provide verified information to the media and in their news releases. Any inaccurate information inadvertently given should be corrected promptly and publicly.

9.13 Emergency Medical Preparedness

In this section, I consider the related issues of Tactical Emergency Medical Support (TEMS) and civilian emergency medical services (EMS) at Aboriginal occupations and protests. This issue was an area of considerable controversy at the Part 1 hearings, and several parties, including the OPP, addressed TEMS/EMS in their final submissions.

The Inquiry did not have a consultation process on emergency medical preparedness. Apart from the opportunity to comment on the submissions of other parties in reply submissions, there was no exchange of views among the parties on these topics under the auspices of the Inquiry. Moreover, almost all of the research, analysis, and recommendations received at the Inquiry addressed TEMS/EMS generally, and not the role of these services in Aboriginal occupations and protests

specifically. For these reasons, my only recommendation in this area is for the Ministry of Community Safety and Correctional Services to bring together interested parties to discuss the issues and concerns raised in this report, particularly the advice and recommendations of the Office of the Chief Coroner (OCC).⁸²

The OCC provided considerable leadership on the TEMS/EMS issue in both parts of the Inquiry. The OCC submissions were based on the evidence adduced at the Part 1 hearings and on a research paper (the “Feldman-Schwartz-Morrison” study) commissioned jointly by the Inquiry and OCC on the effectiveness of TEMS in public order policing.⁸³

9.13.1 Tactical Emergency Medical Support (TEMS)

TEMS is most commonly the term for the paramedics assigned to work with a police tactical unit, such as a public order unit or an emergency response team. In Canada, the paramedics are usually not police officers. Rather, they are members of medical service agencies, such as ambulance services, who receive specialized training with the police units they support and follow shared policies and procedures with the tactical units. In Ontario, all paramedics must have access to a supervising physician, either at the scene or at a base hospital by radio/cellular phone.

The Feldman-Schwartz-Morrison research study commented on the concept:

The concept of tactical emergency medical support teams is endorsed by several major U.S. and international medical and law enforcement organizations, and is defined by a large body of specialized knowledge and skills ... Experience with medical care in military tactical theatres has shown a dramatic decrease in deaths from injuries sustained on the battlefield. Until further research into the value of civilian TEMS is available, tactical emergency medical support modeled on the military system should comprise part of every civilian tactical law enforcement unit.⁸⁴

The OPP told the Inquiry that it was considering enhancements to OPP policy in this area, including “contracting for, and training of, a limited number of critical-care paramedics on a part-time basis for all high-risk and Public Order events.” However, they also said that financial constraints limit their ability to hire paramedics as members of tactical teams.⁸⁵

The OCC and the Feldman-Schwartz-Morrison research study both concluded that public order policing units, whenever they are deployed, should include a TEMS component as part of the operational response.

The OCC also recommended that TEMS be full-time in order to permit ongoing training with police emergency and tactical response units and to improve coordination with civilian EMS, hospitals, and other health care providers whose services may be required in the event of injury to officers or civilians. There would be obvious financial and practical challenges in implementing this recommendation. For example, there would be logistical difficulties in providing TEMS in large areas of the province with only sporadic need for those services. Apart from air ambulance, there are no province-wide emergency medical services with which the OPP could contract for TEMS. The Feldman-Schwartz-Morrison study suggested that a regionalized approach might help, but conceded that response times might suffer.

The OCC further recommended that paramedics with advanced life support capabilities should be more available through local emergency medical services.

A final issue is whether TEMS should be available only to police officers and to persons arrested. In the RCMP Tactical Operations Manual, police are given the highest treatment priority at public order incidents, and emergency medical teams will also treat “arrested demonstrators.” The report of the Commission for Public Complaints Against the RCMP with respect to actions by the RCMP at the Summit of the Americas in Quebec City in April 2001 criticized this apparent limitation excluding demonstrators who were not arrested. The RCMP subsequently acknowledged that the policy did not provide direction on treatment to demonstrators who had not been arrested and stated that medical assistance would be provided if circumstances permitted, depending on resources, operational requirements, and a safe working environment.⁸⁶ In contrast, I have been advised that the Ottawa police service routinely plans for treating protesters. The OCC submission clearly assumes that TEMS will treat everyone.

9.13.2 Pre-Event Coordination and Planning

The Office of the Chief Coroner recommended improved communication links and coordination between police services engaged in responding to public order events or major incidents and pre-hospital care providers (EMS) to ensure rapid land or air evacuation of injured persons to health care centres with appropriate facilities to treat life-threatening trauma.⁸⁷

9.13.3 Communications about Injured Persons

Police need to ensure that medical professionals are aware of medically important information about the incident and about the person injured. In some circumstances, family members or others who have important information about the injured person should be allowed, and encouraged, to communicate that

information to hospital and emergency staff promptly. The OCC recommended that police, EMS personnel, and hospital staff be trained in communicating medically important information effectively.⁸⁸

9.13.4 Post-Incident Counselling

Many individuals—occupiers, members of the local First Nation, and the OPP—suffered deep, possibly permanent trauma as a result of the events at Ipperwash. I am aware that the OPP has improved programs to meet the needs of police officers in these situations. Unfortunately, there appears to be no equivalent program for members of the community. Several parties supported the proposal that timely access to counselling services should be provided for those who experience debilitating emotional and psychological consequences from exposure to or involvement in violent and traumatic events involving police actions. They recommended that Aboriginal healing be included in the range of available responses.⁸⁹

9.13.5 Effectiveness

The Feldman-Schwartz-Morrison study found that there were “no current systematic reviews of the effectiveness of tactical emergency medical support.”⁹⁰

[As] a subspecialty of emergency prehospital care, little evidence specific to the effectiveness of civilian law enforcement tactical emergency medical support is available. Future research should identify clinical and system outcomes that could evaluate implementation strategies and performance benchmarks. Tactical emergency medical support teams should be encouraged to document and report on the population based epidemiology of events precipitating a tactical emergency medical response and on its outcomes.”⁹¹

Recommendations

38. Police services in Ontario should promote peacekeeping by adopting the following objectives when policing Aboriginal occupations and protests:
 - a. Minimize the risk of violence at occupations and protests.
 - b. Preserve and restore public order.
 - c. Facilitate the exercise of constitutionally protected rights.
 - d. Remain neutral as to the underlying grievance.

- e. Facilitate the building of trusting relationships that will assist the parties to resolve the dispute constructively.
39. The OPP should maintain its Framework for Police Preparedness for Aboriginal Critical Incidents, Aboriginal Relations Teams, and related initiatives as a high priority and devote a commensurate level of resources and executive support to them.
 40. The OPP should commission independent, third-party evaluations of its Framework for Police Preparedness for Aboriginal Critical Incidents and Aboriginal Relations Team program. These evaluations should include significant and meaningful participation by Aboriginal representatives in their design, oversight, and analysis.
 41. The OPP should post all significant OPP and provincial government documents and policies regarding the policing of Aboriginal occupations and protests on the OPP website. The OPP should also prepare and distribute an annual report on the Framework for Police Preparedness for Aboriginal Critical Incidents.
 42. The OPP should establish a formal consultation committee with major Aboriginal organizations in Ontario.
 43. The OPP should develop a consultation and liaison policy regarding non-Aboriginal communities which may be affected by an Aboriginal occupation or protest. This policy should be developed in consultation with local non-Aboriginal communities and should be distributed to local officials and posted on the OPP website.
 44. The OPP should develop a strategy to restore relationships with both Aboriginal and non-Aboriginal communities after an Aboriginal occupation or protest. The provincial, federal, and municipal governments should support and participate in this strategy. This strategy should be distributed to interested parties and posted on the OPP website.
 45. The provincial government should develop a provincial peacekeeping policy to govern its response to Aboriginal occupations and protests. The policy should publicly confirm the provincial government is committed to peacekeeping, and it should promote consistency and coordination between the provincial government and police services in Ontario. This policy should include:

- a. a ministerial directive from the Minister of Community Safety and Correctional Services to the OPP confirming peacekeeping as the provincial government policy during an Aboriginal occupation or protest. The directive should acknowledge and support the general purposes and practices of the OPP Framework for Police Preparedness for Aboriginal Critical Incidents; and,
- b. a ministerial guideline from the Minister of Community Safety and Correctional Services to other police services in Ontario, functionally equivalent to the OPP directive but allowing for adaptation to local circumstances.

The provincial peacekeeping policy should state that it is applicable to the Ministry of Community Safety and Correctional Services, the OPP, the Ministry of Natural Resources, and any other ministries or agencies which may be involved in an Aboriginal occupation or protest.

The provincial peacekeeping policy should be promulgated as soon as practical. The Ministry of Community Safety and Correctional Services should then initiate a consultation process with First Nations, the OPP, other police services, and local communities as appropriate regarding the scope and content of a longer-term policy.

- 46. The provincial government should commit sufficient resources to the OPP to support its initiatives for policing Aboriginal occupations. This funding should be dependent upon the OPP agreeing to commission and publish independent evaluations of the Framework for Police Preparedness for Aboriginal Critical Incidents and the Aboriginal Relations Team program.
- 47. The provincial government should develop a policy governing the use of injunctions at Aboriginal occupations and protests. The policy should state that its purpose is to promote peacekeeping in Aboriginal occupations and protests. The policy should acknowledge the unique role of the Attorney General in injunction proceedings and commit the province to participating in proceedings where private landowners seek an injunction and treaty and Aboriginal rights may be affected.
- 48. The OPP should have the right to be represented separately in injunction proceedings. The provincial government should facilitate court-appointed counsel for interested parties in injunction proceedings if their participation would contribute to the court's understanding of the issues in dispute.

49. Interministerial “blockade” committees should be organized carefully to ensure that they respect ministerial accountability. These committees should be briefed on the following matters:
- a. appropriate roles and responsibilities of police and government;
 - b. existing provincial government and police peacekeeping policies;
 - c. general aspects of police strategy and objectives when policing Aboriginal occupations and protests;
 - d. the unique constitutional status of Aboriginal rights and claims, and the constitutional right of peaceable assembly; and,
 - e. the history, issues, and claims that may be in dispute.

Relevant ministers, ministerial staff, and other senior provincial officials should also be briefed on these issues.

50. The provincial government should adopt a flexible policy regarding negotiations with protesters during an Aboriginal occupation or protest. The factors to be considered should include:
- a. a realistic assessment of the claim asserted by the protesters;
 - b. risks to public safety;
 - c. the willingness or capacity of protesters or the First Nation to negotiate;
 - d. the likelihood of a constructive, peaceful, timely agreement;
 - e. the social or economic disruption caused by the occupation; and,
 - f. any other relevant factors.
51. Federal, provincial, municipal, and First Nation governments should actively promote public education and community information about significant Aboriginal protests. The OPP should also actively promote public education and community information.
52. The federal government should publicly commit to working with the provincial government during Aboriginal occupations or protests in Ontario, cooperatively and with a shared commitment to settling underlying disputes. The federal government should generally assume the lead responsibility in negotiations when land claims are at stake.

53. The provincial government, First Nations organizations, the OPP, and other police services in Ontario should develop networks promoting communication, understanding, trust, and collaboration during Aboriginal occupations and protests. The following elements should be included in this effort:
 - a. The OPP and First Nations organizations in Ontario should develop public safety, communications, and/or operational protocols.
 - b. The OPP and First Nations police services should jointly plan for responding to Aboriginal occupations and protests. Existing protocols between the OPP and First Nation police services should be amended to include references to occupations and protests.
 - c. The provincial government, the OPP, and representatives from municipal police services should develop resources, practices, or protocols to assist municipal police services during Aboriginal occupations and protests in urban areas.
 - d. The OPP and the Ministry of Natural Resources should develop an operational protocol consistent with the purposes and practices in the OPP Framework for Police Preparedness for Aboriginal Critical Incidents.
 - e. The OPP should provide crisis negotiator training to First Nations police services.
54. The OPP and other police services should provide verified information to the media in their news releases. Inaccurate information should be corrected promptly and publicly.
55. The Ministry of Community Safety and Correctional Services should bring together interested parties to discuss the Tactical Emergency Medical Support and civilian emergency medical services issues in this report, including the advice and recommendations of the Office of the Chief Coroner.

Endnotes

- 1 (i) John Borrows, “Crown and Aboriginal Occupations of Land: A History & Comparison;” (ii) Don Clairmont and Jim Potts, “For the Nonce: Policing and Aboriginal Occupations and Protests;” (iii) Willem de Lint, “Public Order Policing in Canada: An Analysis of Operations in Recent High Stakes Events;” (iv) Wayne Wawryk, “The Collection and Use of Intelligence in Policing Public Order Events” (Inquiry research papers).
- 2 The OPP provided the Inquiry with the following background papers which discussed changes in public order policing practices since 1995 in detail, including intelligence, note taking, training, equipment, and emergency medical support: “OPP Public Order Units: A Comparison of 1995 to 2006,” “Summary of Changes to POU 1995-2006,” “OPP Emergency Response Services: A Comparison of 1995 to 2006,” and “Summary of Changes to Integrated Response 1995-2006” (Inquiry projects).
- 3 Clairmont and Potts, p. 11.
- 4 de Lint, p. 4.
- 5 Ibid., p. 20.
- 6 Ibid., p. 14.
- 7 Wawryk, p. 5.
- 8 *Criminal Code*, (R.S. 1985, c. C-46) ss. 25-27.
- 9 See generally “OPP Public Order Units: A Comparison of 1995 to 2006” (Inquiry project).
- 10 Clairmont and Potts, p. 19.
- 11 See generally Clairmont and Potts, pp. 25-57.
- 12 OPP, “Aboriginal Initiatives — Building Respectful Relationships” (Inquiry project), Appendix E.
- 13 Clairmont and Potts, pp. 67-83.
- 14 Ibid., pp. 68-71.
- 15 Ibid., p. 79.
- 16 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, Ontario Court of Appeal, released December 14, 2006, at para. 114.
- 17 Ibid., paras. 117-8.
- 18 Ibid., p. 82.
- 19 Ibid., p. 25.
- 20 Ibid., p. 30.
- 21 The Chippewas of Nawash Unceded First Nation, “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash” (Inquiry project), pp. 213-24.
- 22 Nishnawbe-Aski Police Services Board, “Confrontations over Resources Development” (Inquiry Project), p. 29.
- 23 The description of the OPP in this section is taken from OPP, “Aboriginal Initiatives,” pp. 9-11.
- 24 Ibid. The OPP also identified several new or developing initiatives intended to meet the same objectives,

including: regional Aboriginal liaison councils; enhancements to the executive development program; additional Aboriginal Liaison Operations Officers; additional ART members; enhanced mentoring for Aboriginal OPP members; localized Native Awareness Training; the Jim Potts Award; and support for the Law Enforcement and Aboriginal Diversity Network (LEAD). These and other initiatives are described in detail in the OPP report.

25 Ibid., Appendix E, p. 2.

26 Gwen Boniface testimony, June 14, 2006, Transcript pp. 89-90.

27 OPP Part 2 submission, p. 15.

28 Ibid., p. 4.

29 Ibid., p. 61.

30 Clairmont and Potts, p. 27.

31 Ontario Secretariat for Aboriginal Affairs, "Six Nations (Caledonia) Negotiations Costs to Date," <http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/news_061102.html>. The provincial government has asked the federal government to reimburse it for these costs.

32 Nishnawbe-Aski Police Services Board, p. 7-8.

33 Amnesty International submission, p.16.

34 In the course of a critical incident, OPP officers prepare substantial records or materials. Qualified "scribes" prepare incident commanders' notes, which must be corrected and adopted by the incident commanders. POU commanders on the scene are accompanied by a scribe with a micro-cassette recorder. All radio and telephone communications into and out of the Provincial Communications Centres are recorded and stored digitally. During Level Two incidents involving the integrated response, all radio communications are recorded and stored digitally, as are all TRU radio communications (on a separate frequency) and all crisis negotiations. Where practicable, communications on the telephone lines in the command post are also recorded and stored digitally. The OPP now has enhanced videotaping capacity to record, for example, the deployment of POU or arrest teams at a public order event. There is now greater reliance upon written intelligence reports, in which information has been vetted through the intelligence process.

35 Mandatory reviews permit not only a systemic analysis of the OPP response to a critical incident, but also the sharing of lessons learned with other commanders and incorporation of those lessons in the initial and ongoing training of commanders and specialty officers. Front-line officers also participate in debriefings.

36 Office of the Auditor General of Ontario, Annual Report 2005, p. 243 <http://www.auditor.on.ca/en/reports_en/en05/312en05.pdf>.

37 Ibid.

38 Ibid., p. 242.

39 I note in passing that the OPP and other police services in Ontario could also use their websites much more creatively. A quick survey of the websites of the Metropolitan Police Service in London, England, the U.S. Federal Bureau of Investigation, the RCMP, and Seattle Police Department, to name but a few, reveals that all of them contain significantly more information, reports, and publications than the OPP website does. See generally: Metropolitan Police Service (London, England) <<http://www.met.police.uk/index.shtml>>; Federal Bureau of Investigation <<http://www.fbi.gov>>; RCMP <<http://www.rcmp-grc.gc.ca>>; and Seattle Police Department <<http://www.cityofseattle.net/police>>.

40 Aboriginal Legal Services of Toronto Part 2 submission, p. 56.

41 The reports of Her Majesty's Inspectorate of Constabulary are available at <<http://www.inspectorates.home->

office.gov.uk/hmic>, including “City of London Police: Managing Public Disorder” (July 2003), found under “Best Value Inspection Reports.”

- 42 The OPP could logically extend the practice of self-review and public reporting to a range of its other activities. Public reports of this sort would complement existing public accountability mechanisms.
- 43 OPP Part 2 submission, p. 21.
- 44 Municipality of Lambton Shores submission, p. 15.
- 45 Gwen Boniface testimony, June 14, 2006, Transcript pp. 197-201.
- 46 I discuss section 3(2)(j) of the *Act* in some detail in chapter 12. This section gives the ministry the authority to issue policy directives to police services in Ontario. For present purposes, it is sufficient to say that nothing recommended in this section could be considered to infringe upon “police independence” or to be beyond the authority of the ministry.
- 47 *Police Services Act*, section 17(2). I also discuss this section in detail in chapter 12.
- 48 This section concerns injunctions against an Aboriginal occupation or protest. In chapter 5, I discuss the *Platinex* decision and injunction proceedings in the context of the duty of the province to consult and accommodate.
- 49 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, Ontario Court of Appeal, released December 14, 2006.
- 50 *Ibid.*, at para. 113.
- 51 *Ibid.*, at para. 116.
- 52 *Ibid.*, at para. 135.
- 53 OPP Part 2 submission, para. 57.
- 54 *Ibid.*, para. 58.
- 55 *Ibid.*, para. 57.
- 56 *Ibid.*, para. 59.
- 57 Chippewas of Kettle and Stony Point First Nation submission, p. 75.
- 58 OPP Part 2 reply submission, p. 93.
- 59 W. Wesley Pue, “Trespass and Expressive Rights,” p. 50. (Inquiry research paper).
- 60 J.L.I.J. Edwards, *The Attorney General, Politics and the Public Interest*. (London: Sweet and Maxwell, 1984), p.190; J.L.I.J. Edwards, “The Attorney General and the Charter of Rights,” in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), p. 53; Ian G. Scott, “The Role of the Attorney General and the Charter of Rights,” 29 *Criminal Law Quarterly* 187 (1987), p. 197.
- 61 OPP Part 2 submission, para. 61.
- 62 Chippewas of Nawash Unceded First Nation, p. 13.
- 63 Ontario Secretariat for Aboriginal Affairs, “Six Nations (Caledonia) Negotiations,” <<http://www.aboriginalaffairs.osaa.gov.on.ca/english/caledonia>>.
- 64 October 12, 2006 email to Inquiry staff from counsel for the Province of Ontario (on file with the Inquiry).

- 65 Royal Canadian Mounted Police, "Public Safety Cooperation Protocol Between the Assembly of First Nations and Royal Canadian Mounted Police," <http://www.rcmp-grc.gc.ca/ccaps/psc-protocol_e.htm>.
- 66 Clairmont and Potts, p. 81.
- 67 Chiefs of Ontario Part 2 submission, p. 6: "Protocols should be negotiated between police services in Ontario and First Nations political representatives (at the community and regional political organization levels) in order to avoid and/or resolve conflicts without incident."
- 68 Protocol Agreement between Nishnawbe-Aski Police Services and OPP, 2003, included in OPP Part 2 materials, distributed at the Inquiry's OPP Forum, January 2006 (on file with the Inquiry).
- 69 Chiefs of Ontario Part 2 submission, p. 56.
- 70 OPP Part 2 submission, p. 28.
- 71 Clairmont and Potts, p. 37.
- 72 OPP Part 2 submission, p. 33.
- 73 Clairmont and Potts, p. 64.
- 74 Ibid., p. 45.
- 75 Ibid., p. 85.
- 76 Aboriginal Legal Services of Toronto, "Ipperwash and the Media: A Critical Analysis of How the Story Was Covered" (Inquiry project). John Miller examined print media coverage in nineteen Canadian daily newspapers, *Maclean's* magazine, and four wire services, approximately between August and October 1995. In total, he examined 496 articles. Several other Inquiry papers included comments on the effect of news coverage, including Wawryk, and Clairmont and Potts. A number of parties also commented on news coverage in their submissions.
- 77 Ibid., pp.19-23.
- 78 The OPP apologized during the Inquiry for issuing two news releases on Ipperwash, both on September 7, 1995, which contained inaccurate statements about the incident, notably that the occupiers were armed. The OPP contended that OPP officers believed the information to be correct at the time. See OPP Part 2 reply submission, p. 68.
- 79 OPP Part 2 reply submission, pp. 132-3.
- 80 Aboriginal Legal Services of Toronto Part 2 submission, p. 15.
- 81 Wawryk, p. 26.
- 82 The Office of the Chief Coroner also organized educational sessions for the Inquiry and the parties on current TEMS practices.
- 83 Michael J. Feldman, Brian Schwartz, and Laurie J. Morrison, "Effectiveness of Tactical Emergency Medical Support: A Systematic Review" (Inquiry research paper).
- 84 Chief Coroner for Ontario and the Office of the Chief Coroner submission, p. 10.
- 85 OPP, "OPP Emergency Response Services: A Comparison of 1995 to 2006" (Inquiry project), pp. 13-4.
- 86 RCMP Commissioner G. Zaccardelli, letter to Shirley Heafey, Chair, Commission for Public Complaints against the RCMP, February 3, 2004, p. 11 (on file with the Inquiry).
- 87 Chief Coroner for Ontario and the Office of the Chief Coroner submission, p. 24.

88 Ibid., p. 25.

89 The Chippewas of Kettle and Stony Point First Nation submission, p. 84, included a recommendation that “the province, in consultation with the First Nation, conduct an audit of counseling needs arising from the incident and develop a healing strategy for access to counseling, whether such counseling be oriented more towards conventional medical services or towards Aboriginal traditional healing.” The Office of the Chief Coroner and the Aazhoodena and George Family Group submissions also supported this recommendation.

90 Feldman, Schwartz, and Morrison, p. 1.

91 Ibid., p. 10.

FIRST NATION POLICING

I consistently heard from researchers, parties, witnesses, and participants in our consultations that First Nation police services could help to improve the relationship between Aboriginal peoples and the police and reduce the potential for violence.

First Nation police services often support the OPP during occupations and protests in the OPP jurisdiction. First Nations police services are also often called upon to police occupations and protests within their own communities. First Nation police services also play an important role in preventing occupations and protests in the first place by acting to diffuse tensions before they escalate into a protest. These responsibilities are likely to increase for two reasons. First, the OPP is likely to withdraw from directly policing First Nation communities. Second, Northern Ontario is likely to be the site of more Aboriginal occupations and protests in the future and most of Northern Ontario is policed by First Nation police services. The security and effectiveness of First Nation police services is, therefore, very important to my Part 2 mandate to make recommendations to prevent violence in Aboriginal occupations and protests.

First Nation policing was discussed extensively at the OPP “Building Relationships” forum in January 2006 and at the Chiefs of Ontario Special Assembly with the Inquiry in March 2006. It was also discussed in several submissions to the Inquiry, most extensively in the submission from the Nishnawbe-Aski Police Services (NAPS).

Commissions and inquiries across the country have cited the potential benefits of First Nation policing. They have repeatedly encouraged the development of self-directed and culturally appropriate First Nation police services. The Royal Commission on Aboriginal Peoples is one example:

The desire to participate in both the development and operation of policing institutions and services has been articulated by Aboriginal people in conferences, research reports and justice inquiries, both provincial and federal. At the root of this is the belief on the part of Aboriginal people that long-lasting solutions to policing programs are grounded in the people and the communities themselves. Obviously, Aboriginal self-government offers the greatest scope for community involvement in policing. This is not simply because it is the most promising — although not the only — avenue to change in existing arrangements, but because it promises a coherent and comprehensive

foundation for community governmental structure, decision making and law making authority, all of which are prerequisites for the development, implementation and operation of truly autonomous Aboriginal police forces.¹

Despite continuing support from inquiries, reports, and mainstream police services, advocates for First Nation police often complain of the “second-class” funding and legal status accorded to them. They argue that First Nation forces are “set up to fail,” because they lack funding and their mandates are limited. They say that First Nation police services should be funded and supported as replacements—not enhancements—to mainstream police forces in their jurisdictions. On that subject, the Inquiry repeatedly heard that First Nation police services continue to face challenges:

- There is considerable demand for their services.
- They are generally small organizations, and not funded to provide the services that First Nation communities expect of them.
- They often lack specialized services.
- Often, they are responsible for policing huge geographic territories.
- They do not have the legal or financial security of even a small mainstream police service.

The Inquiry research paper on First Nation policing by Professor Don Clairmont was a comprehensive review of the history, services, limitations, and potential of First Nation policing throughout Canada.² Professor Clairmont’s research profiled nine self-administered police services in Canada, including five in Ontario.³

First Nation police services in Ontario are both valuable and successful. They make important contributions to public safety, promote culturally appropriate policing, and help build respectful relationships between police and Aboriginal peoples across the province. The question is how to support and sustain them so that they may be even more effective in the future.

In my view, provincial, federal, and First Nation governments need to jointly commit to renewing First Nation police services in Ontario. Together, they must consolidate the gains made so far and move to place First Nation police services on much firmer financial, operational, and legal ground. Otherwise, First Nation police services will continue to retain their status as programs or experiments, not full-fledged police services. That would be unfortunate. I believe that reforms are necessary to allow First Nation police services to realize their considerable potential as policing and peacekeeping services for their communities.

My recommendations in this chapter are intended to assist First Nation police services to develop and provide to First Nation communities the same quality of policing that most Ontarians take for granted, or which may even be available in communities neighbouring First Nations if they happen to be policed by the OPP. These recommendations are intended to protect community safety, to ensure sustainable, professional policing, to promote culturally appropriate policing and peacekeeping, and to promote and protect public order in vulnerable communities. Yet, at some level, the issue can be simply reduced to equality and fairness. There is no reason why residents of First Nations in Ontario should have lower-quality policing than non-Aboriginal Ontarians do.

This chapter will focus primarily on self-administered First Nation police services, because they have become the dominant model in Ontario. With some exceptions, it is expected to be the main form of First Nation policing in the future.

10.1 Why First Nations Want to Police Themselves

Grand Chief Stan Loutit of the Mushkegowuk Tribal Council told the Inquiry that the impetus to build a justice system is rooted in nationhood:

We want to develop our own forms of justice ... Justice is a key component of nation building. I feel that these initiatives that we've heard about today should be supported because they come from the people ... and if something comes from the people, we take ownership, we have a sense of pride, we have a sense that it's ours.⁴

Deputy Grand Chief Simon Fobister of Grassy Narrows First Nation further explained why First Nations want to control their own policing:

After years of fielding complaints from both the First Nation constables under the tripartite Ontario First Nations Policing Agreement and the complaints of our people in the communities for lack of response and disrespectful service, and too many complaints of use of excessive force used by the OPP officers, the Treaty Number 3 First Nations sought their own police service ... We desire our own police service to be able to enforce our own laws. We acknowledge that there has been a clear reduction of police harassment and use of excessive force during the arrest process involving the First Nation police.⁵

Several submissions to the Inquiry and many speakers at Inquiry forums and consultations echoed this view, including the Chiefs of Ontario:

There is a need for more recognition, support and financial resources from both Ontario and Canada for First Nations-directed police services in Ontario and for First Nations-based administration of justice systems. There is a need for greater recognition of First Nations' law and support for First Nation enforcement processes, together with a commitment to reciprocal arrangements for implementation of First Nations-based justice systems.

First Nation police services are unique institutions. They are not simply alternatives to mainstream police services. Indeed, the consensus among previous inquiries and reports is that mainstream policing and law enforcement are generally culturally foreign to Aboriginal peoples. This is because First Nations have traditionally had their own systems of law and justice, which are considerably different from mainstream justice and policing. For example, the Nishnawbe-Aski Police Services explained that in several First Nation languages, the word for "police" means "the one who holds the weapon, the one who holds the weapon over you," and "the one who locks you up or the one who binds you," and "the one who apprehends you or the one who takes you away."⁶

Indeed, many First Nation leaders believe that First Nation policing was intended to be a transition between mainstream policing and a dedicated First Nation peacekeeping service, as NAPS explained:

First Nations maintained certain level of community norms that membership were expected to up-hold. The premise of such expectations was based upon respect for rule of law or traditions/customs. When direct intervention was required, the First Nation communities had people who were assigned the responsibilities as peacekeepers or monitors. The approaches exercised were not intrusive but included counseling, reconciliation and healing.

In many of the First Nations communities where peacekeeping measures were not successful, then the community had to take progressive measures to ensure security and protection of the community members. Such measures required community support and agreement. The most extreme measure taken would have been banishment from the community. Banishment measure was not a surprise tactic as all members were aware of potential consequences for continued disrespect of community norms.

The direct intervention measures were less intrusive as to ensure that measures taken were for the good of the individual and the community.

The intervention was about healing and restoration.

Peacekeeping responsibilities varied from each nation and community. These responsibilities were determined by the community as a whole and what measures were required to resolve the issues that give rise to the need for direct intervention.⁷

It will likely be extremely difficult, if not impossible, to realize the potential of a true First Nation peacekeeping service if First Nation police services are unable to match the services and legal and financial security of even a small municipal police service.

10.2 First Nation Police Services in Ontario

There are currently nine self-administered First Nation police services in Ontario. Together, these services police 114 First Nation communities with a total population of more than 75,000.⁸

Self-administered First Nation police services are established and governed by a First Nation or band council, usually through a police commission. Subsection 81(1)(c) of the *Indian Act* provides that a band council may pass a bylaw for the purpose of “the observance of law and order,” which is the statutory authority to establish a police commission and a police service. The police commission employs First Nation constables, who are appointed in Ontario by the commissioner of the OPP under section 54(1) of the *Police Services Act*. Each self-administered police service is headed by a chief of police who reports to the police commission. Federal and provincial governments fund self-administered police services under the First Nations Policing Policy through agreements signed by the First Nation, Canada, and Ontario.

Demand for First Nation policing is likely to increase in the future. As noted earlier, the population of Aboriginal peoples, both on and off reserves, is increasing. The potential for Aboriginal occupations and protests is also increasing.⁹

10.2.1 First Nation Policing in Ontario

First Nation police services are young institutions.¹⁰ Before 1960, the RCMP was solely responsible for policing First Nations in Ontario. This began to change in 1960s, when the RCMP withdrew from policing First Nations in Ontario and Quebec. In Ontario, the transfer of responsibility for policing First Nations to the OPP was completed in 1971. Self-administered First Nation police services did not emerge as institutions until the early 1970s.

First Nation policing changed significantly in 1991 with the federal First Nations Policing Policy (FNPP). The FNPP was intended to provide First Nations with police services that were “professional, effective, culturally appropriate and accountable to the communities they serve.” First Nation police services were to be “equal in quality and level of service to policing services found in communities with similar conditions in the region.” The FNPP encouraged First Nations, the federal government, and the provinces to enter into agreements to provide First Nation policing through a variety of models, including First Nation-administered police services. Over time, the self-administered model became the dominant model of First Nation policing in Ontario.

The main elements of the FNPP are still in place.¹¹ According to the federal government, the FNPP is “a practical means to support the federal policy on the implementation of the inherent right and the negotiation of self-government.”¹²

The FNPP assumes that First Nation policing will be an add-on or enhancement to basic policing services provided by the RCMP or a provincial police service. That assumption leads to inadequate funding where self-administered First Nation police services are actually the primary service providers for their communities, as is the case in Ontario and some other provinces. This is not just an Ontario problem. It is a critical flaw in the FNPP, a national policy, which the federal government should address.

Ontario and Canada signed the first Ontario First Nations Policing Agreement (OFNPA) in 1992. The OFNPA has been renewed several times and remains in place today. The OFNPA enshrines the principle that First Nations in Ontario should decide what kind of policing arrangements are best suited to their communities. The OFNPA also provides for cost-sharing between Ontario and Canada to fund First Nation police services. Since the introduction of the OFNPA, funding for First Nation police services in Ontario has increased significantly. Combined federal and Ontario government funding for First Nation policing increased from \$16.1 million in 1992/93 to \$58.4 million in 2006/07.¹⁴

First Nation policing arrangements now serve 96% of the on-reserve population in Ontario. Seven of the current nine self-administered police services came into being between 1991 and 1996. Treaty Number 3 Police Service was established in 2002 and Mnjikaning Police Service became self-administered in 2006. The self-administered police services employ about 375 officers.¹⁵ Thirty-nine First Nations in Ontario receive policing services from the OPP, twenty directly and nineteen through First Nation constables supervised by the OPP. Over time, the OPP expects that most of these thirty-nine communities will move toward the self-administered model. In Canada, there are forty-eight self-administered police services, employing 775 officers and serving 197 First Nations.¹⁶

Despite these gains, the Inquiry was consistently told that the promise of the OFNPA has not been fulfilled. First Nation police services in Ontario continue to be underfunded, and the implementation of the OFNPA has therefore fallen far short of its objectives.

There have been other setbacks for First Nation policing in Ontario. In 1981, the governments of Ontario and Canada established the Ontario Indian Police Commission (OIPC). The OIPC provided a forum for discussing policing services in First Nations in the province, including issues involving the OPP and First Nation police services. First Nations hoped that the OIPC would eventually evolve into an agency that could assist with civilian oversight of police and public complaints about First Nation policing. In March 2004, the commission closed when the federal government decided not to renew its support.

First Nation police services are too important to allow this situation to continue. The federal and provincial governments should update their policies on First Nation policing to recognize that self-administered First Nation police services are the primary police service providers in their communities and to provide for the increased funding commitments required to carry out that role.

10.2.2 Quality of First Nation Police Services

Professor Clairmont reviewed First Nations police service studies and surveys commissioned by the federal government.¹⁷ He also interviewed many people involved in First Nation policing, including First Nation police officers, police board members, OPP officers, and members of the community.¹⁸ In general, the evaluations and surveys resulted in the following findings regarding First Nation police services:

- First Nation communities preferred them to the OPP because of the greater police presence in the communities and because of “the value of having their own people as members and managers of the police service”
- They met the terms of the funding agreements
- They provided “solid, professional crime-control policing”
- Their response times to calls for assistance were acceptable

In the interviews, First Nation leaders acknowledged the successes of First Nation police services, but also voiced the same criticisms repeatedly. There was a call for more collaboration with local agencies, more involvement with youth and more peacekeeping; in general, a common critique, not expressed stridently but a critique nevertheless, has been that the policing has yet to capture the essence of native differences or to distinguish itself from good professional mainstream policing.¹⁹

Self-administered First Nation police services in Ontario work remarkably well, considering that they are relatively new and considering the constraints imposed by federal and provincial policies and funding. The range of models for organizing local or regional police services now in use in Ontario allows First Nation communities to choose appropriate ways of providing services, rather than forcing them into one structure.

10.2.3 First Nation Police Services and the OPP

There is strong evidence that the OPP and self-administered First Nation police services enjoy very good working relationships, locally and at the senior level.²⁰ The testimony of former OPP Commissioner Boniface and the OPP submissions supported this conclusion, and supported increased funding and secure legislative status for First Nation police services.²¹

The benefits of the mutually supportive relationship between the OPP and First Nation police services flow both ways. The OPP supports First Nation police services in the following ways:

- OPP members have acted as technical advisors in every transition to a new First Nation police service. Five of the nine First Nation chiefs of police in Ontario are former OPP officers.
- The Integrated Support Services Unit (ISSU) was developed with First Nation chiefs of police to enable the OPP, RCMP, and First Nation police services to develop crime prevention initiatives to target suicide prevention, youth empowerment, and community wellness.
- Integrated Support Units (ISU) are six-person OPP squads in northwestern and northeastern Ontario which assist and mentor NAPS officers.
- The OPP developed a First Nations investigator course in 1998 and a First Nations family violence course, in partnership with the First Nations Chiefs of Police Association, in 2000. These courses were offered to First Nation officers, whether or not they were OPP members. At the OPP Academy, officers of First Nation police services have priority access to supervisor and criminal investigator courses and courses related to sexual assault.
- The OPP has worked with First Nation police services on training initiatives. As examples, a Mnjikaning Police Service officer was trained for the Emergency Response Team, twelve Treaty Three officers were to be trained in emergency response containment in fall 2006, and First Nation police service officers have been trained as crisis negotiators.

- OPP policies and Police Orders are provided to First Nation police services for their use in developing their own policy manuals.²²

As I discussed in chapter 9, the operational protocols between the OPP and First Nation police services provide for mutual support in a variety of situations, including serious crimes. Other forms of mutual support include the following:

- First Nation police officers often interpret the background of grievances and issues for their OPP colleagues, advise them on the risks involved in responding to occupations and protests, and help them to predict how occupiers/protesters and their supporters will react to police actions.
- OPP Aboriginal officers are assigned to First Nations police services for developmental purposes.
- First Nation police services and First Nation elected leaders meet regularly with OPP detachment commanders to discuss issues of mutual interest. The manager of the OPP First Nation programs consults daily with OPP-policed communities, and with self-directed First Nation police services.
- Members of senior management at the OPP, including the commissioner, participate in the national First Nations Chiefs of Police Association. This is in addition to consultations between the Aboriginal Liaison Officer—Operations, regional liaison officers, ART, ISSU, senior management, senior regional command staff, and First Nation communities, including their police services. The OPP and First Nation police services jointly carry out investigative or enforcement initiatives. As examples, the Akwesasne First Nation police force is involved in the Joint Anti-Smuggling Task Force, and the Integrated Border Enforcement Team includes First Nations police forces from Akwesasne, Six Nations, Walpole Island, Garden River, Thunder Bay, and Kenora.

The OPP supports First Nation policing, and deserves to be commended for the initiatives it has developed with First Nation police services. Best practices have emerged which are of mutual benefit, and the OPP and its First Nation partners should both receive recognition for their efforts.

First Nation self-administered police services are very small compared to the OPP and most municipal police services in Ontario. It is not efficient, therefore, for First Nation police services (or smaller municipal police services, for that matter) to provide the full range of specialized services locally, such as tactical or marine units. To provide high quality services in these fields requires networks of support with larger police services. That is why the supportive programs for First Nation police services within the OPP are important.

Operational and policy integration of First Nation police services and the OPP is therefore an appropriate strategy. Integration ensures that benefits flow in both directions. The integration of First Nation police services with other police services at the provincial and local levels “holds the key to a secure self-administered system in Ontario.”²³ All major stakeholders in Ontario prefer the self-administered model. Promoting it will contribute to effective and sustainable First Nation policing.

10.3 Policing Occupations and Protests

Very good relationships appear to exist between the OPP and First Nation police services. As the OPP submission described, they have worked cooperatively on many Aboriginal critical incidents since 1995:

The complexities of policing occupations and protests in Ontario require the utmost flexibility in how specific incidents are addressed. Existing protocols provide flexibility within broad parameters. As witnessed during the OPP Incident Simulation, it is a well-established best practice for the OPP to seek permission as part of a consultative process before deploying OPP resources on First Nations territories. Where incidents occur “off reserve”, there are a myriad of factors that inform the roles that will be played by the OPP and the First Nations police service in responding. For example, the First Nations police service may agree to assume temporary policing responsibilities for an area normally patrolled by the OPP as part of a negotiated process to defuse tensions. Six Nations Police Service has performed this role at Caledonia. Or the OPP will draw upon First Nations police service officers to facilitate discussions with particular interested parties.²⁴

As I have mentioned, First Nation police services may also provide information to the OPP on who is involved in the occupation or advise on how the occupiers will react to actions by the police. Nevertheless, as Professor Clairmont and Inspector Potts concluded, “the capacity of the First Nations police services to effectively deal or even partner with the OPP in responding to the challenge of occupations and protests is very limited.”²⁵ For example, First Nation police usually do not receive specialized training to deal with occupations and protests.

As explained in the Nishnawbe-Aski Police Services (NAPS) submission, the lack of specialized training is a serious barrier to their involvement in responding to occupations and protests: “The only training factored into the NAPS policing is the course content provided at the OPC [Ontario Police College]. NAPS and

most officers do not have any additional training such as crowd control and other specialty operations.”²⁶

In chapter 9, I recommended that collaboration between the OPP and First Nation police services be advanced through improved operational integration, with joint planning and training, and by adding cooperation on occupations and protests to existing protocols between the police services. I also recommended that First Nations develop proposals to increase community capacity for dispute resolution, and that the federal and provincial governments be prepared to support such proposals financially.

One particularly important issue arises when serious occupations and protests occur off reserve. The OPP has greater capacity to police these incidents, but may not have ready access to or awareness of key local people. Professor Clairmont and Inspector Potts reported that virtually everyone they interviewed supported the development of an integrated conflict negotiation/peacekeeping team to solidify the informal relations that have developed between the OPP and First Nation services.²⁷

The Union of Ontario Indians similarly recommended that the Ontario government support First Nations, in training and resources, in developing an Anishinabek Emergency Response Team to address critical incidents. Participants in their consultations indicated that “Anishinabek police officers are most aware of the communities they police and community members are also more comfortable with Anishinabek people.” For that reason, they suggested, that situations would be less likely to escalate with such a response team in place.²⁸

According to the OPP, however, it is preferable to work toward greater operational integration of police services. The OPP submitted that the diversity of First Nations in Ontario makes an integrated, Ontario-wide conflict negotiation team impractical, and would raise resource issues for First Nation police services. The OPP further submitted that ongoing consultations and existing OPP programs (such as ART and MELT) serve the same ends. The OPP also noted that it is often difficult for First Nation police officers to serve on tactical units in their own communities.

I support the choice of First Nation people to police themselves. However, I see two factors that weigh against creating specialized public order or tactical units within First Nation police services. The first factor is cost. To be effective, these units require full-time officers, constantly training to maintain perishable skills.²⁹ Secondly, I appreciate that it may often be difficult for First Nation police to take the lead role in responding to occupations and protests in their own communities. The OPP put it this way:

As well, despite strong support for the principle that First Nations should police themselves, the difficulties for local First Nations police officers in policing Aboriginal occupations or protests (and potentially serving as Tactics and Rescue Unit or Public Order Unit members in their own communities) has been well recognized, and acknowledged by First Nations police services. As a result, there may always be a need for the OPP to provide some policing for Aboriginal occupations or protests, even within a policing structure that financially and philosophically supports self-directed First Nations policing.³⁰

In my view, it is crucial to engage First Nation police services in the response to Aboriginal occupations and protests. It is also crucial to identify how the OPP and provincial government can support First Nation police services to be as effective as possible when policing Aboriginal occupations and protests, either within their own territories or in support of the OPP or other police services in Ontario. Therefore, I believe that the provincial government, the OPP, and First Nation police services should work together to identify how the provincial government and the OPP can best support First Nation police services in the response to Aboriginal occupations and protests.

10.4 Challenges

First Nation police services have the potential to provide services of even higher quality than they do now. I am convinced that they also have the potential to move beyond conventional policing to provide community policing and peacekeeping, to further reduce the potential for violence at Aboriginal occupations and protests, and to improve police/Aboriginal relations. Reaching that potential depends on putting First Nation police services on a firm financial and legislative footing.

Many parties and individuals told the Inquiry that the progress of First Nation policing has stalled. Deputy Grand Chief Simon Fobister related one telling example:

In April 2003 the Treaty Three Police Service (TTPS) was officially established. Currently, there are 23 Treaty Number 3 First Nations policed by the TTPS and we acknowledge that the TTPS has only assumed the administrative responsibility for providing policing services to our First Nations. What we are learning is that we have no real control with this police service because the funding provided by the federal and provincial governments remains totally inadequate, and the

lack of legislative recognition for First Nation police services allows the governments to continue recognizing the First Nation policing services as ‘just a program.’³¹

First Nation police services in Ontario risk failure unless more is done to support and sustain them. The challenges facing First Nation police services essentially fall into four categories: community expectations, legislative status, funding, and governance. These challenges must be met successfully if First Nation police services are to succeed. First Nation police services have failed in several provinces, requiring the RCMP to resume policing on many reserves.³²

I am convinced that the federal and Ontario governments should urgently address the serious developmental issues facing First Nation police services. With proper funding and support, First Nation police services will continue to progress toward their potential. Failure to act to address these issues could mean that First Nation police services in Ontario could suffer the same fate as First Nation police services in other provinces.

Raising the level of funding and securing the mandate of First Nation policing will require the cooperation and agreement of the federal and provincial governments and First Nations in Ontario. Unfortunately, however, Aboriginal policing does not seem to be a high priority on the current agenda of either the federal or the provincial government. For example, the Ontario “New Approach to Aboriginal Affairs” (2005) document on Aboriginal Affairs does not set goals or strategies for First Nation policing.³³ It simply describes current arrangements with the OPP for supporting and supervising First Nation police services.

10.4.1 Community Expectations

The federal First Nations Policing Policy set the objective of providing access to “policing services that are responsive to their particular needs and that meet acceptable standards with respect to the quality and level of service.” First Nations themselves also have appropriately high expectations of their police services. Unfortunately, it is not clear whether either the FNPP objective or the expectations of First Nation communities are being met.

Grand Chief Stan Loutit told the Inquiry about the experience in the Treaty 9 territory:

Policing, the way it’s structured, is something that we do not have any ownership of. In our territory, policing is administered by a tripartite agreement with Canada and Ontario and ourselves to create the Nishnawbe-Aski Police Services. I am proud of that in some respects

that we have our own police service. But I am bothered in other respects that we have merely copied other police services.

And I am bothered as well by the by the fact that we can't administer policing in our territory as we would like to, due to limited funding coming out of that tripartite agreement. The limited funding ... for us to be able to have adequate facilities that any municipality in this province and country takes for granted limits our ability to be able to produce policing in a high standard. It relegates us unfortunately in my opinion to be a second-rate police service.

I implore the government to recognize that need and to provide the resources for us to have the facilities required and the human resources required to be on parallel with any police service in Ontario and the country.

I am proud of the officers and the leadership of our police service who have had to work under dire conditions.³⁴

Nishnawbe-Aski Police Services, which serves a huge territory in the north (three-quarters of the land area of Ontario), catalogued the shortcomings of the present system in its report to the Inquiry.³⁵ NAPS has no capacity to provide community-based policing. Also, any policing outside reserve boundaries is the responsibility of the OPP, yet the OPP has minimal capacity to police the vast areas of the north. As the NAPS report pointed out, "If OPP had to provide such policing, the costs would be prohibitive and the required resources unmanageable."³⁶ According to NAPS, it is virtually impossible for its service to meet the expectations of the community.³⁷

Our research suggests that the criticisms directed at self-administered policing from within First Nation communities have generally centred on police presence (visibility), inadequate specialized active services (such as crime prevention and restorative justice) and the desire for a more problem-solving orientation in policing (community-based policing). First Nation communities also want and expect solid professional policing in order to meet the high level of crime, social problems, and frequent intra-band occupations and protests. Unfortunately, however, as Professor Clairmont points out, self-administered First Nation police services are not in a position to meet those expectations.³⁸

I also know that Aboriginal peoples experience a kind of cultural clash with conventional Canadian policing. There is a tradition of peacekeeping that many people would like their First Nation police services to recapture. Perhaps that

aspiration should be reflected in legislation, policies, and agreements, so that people will start to work out what it means and make concrete plans for ways to build it into day-to-day operations. Similarly, I suggest that the goal of moving towards community policing should be recognized and resources should be applied to getting there.

A good place to begin to address these concerns would a joint federal, provincial and First Nation planning exercise. This would allow all levels of government to participate in the development of long-range plans for First Nation policing in Ontario.

10.4.2 Legislative Status

First Nation police services in Ontario have a tenuous existence in law. Although the federal *Indian Act* provides that a band council may establish a police commission, it does not set out a framework of governance, funding, policing standards, and appointment and powers of officers. Nor does the Ontario *Police Services Act* apply to First Nation police services, beyond providing for the appointment and powers of constables.

I believe that First Nation police services should have a specific legislative foundation. I heard support for that change from First Nation leaders at the Chiefs of Ontario Special Assembly held with the Inquiry.³⁹ The NAPS report to the Inquiry likewise made the point:

The Chiefs of NAN have stated from the beginning that they wanted a police service under their control, a police service that would be culturally appropriate and a police service that would have the legislative base preferable under their own recognized legislative regime.⁴⁰

The OPP also recommended that “[t]here be consideration for a legislative framework for First Nation police services which does not exist today,” and that “[w]ithin that legislative framework, the appointment of First Nations officers by the OPP Commissioner be discontinued, and be transitioned into appointment by the First Nation Police Service or Board.”⁴¹

In my view, the lack of a secure legal basis reinforces the perception that First Nation police services are a temporary phenomenon, a program instead of a legitimate service. First Nation police services in Ontario do not even have the authority to appoint their own officers: the *Police Services Act* gives this power to the commissioner of the OPP jointly with a First Nation police commission.⁴² By way of contrast, municipal police officers are appointed under the sole authority of their police service boards.

I am aware that some First Nations and political organizations in Ontario, probably most, have concerns about the propriety of any provincial legislation with respect to First Nation policing. They believe that their treaty relationship is with the federal Crown and that federal legislation is more appropriate. These are legitimate considerations.

NAPS commented on the potential for First Nations to use the Ontario *Police Services Act* as a framework:

The need for legislative change is to accommodate the NAN policing. Legislative changes will have implications that will need to be worked through with NAN. Most of the Ontario First Nations have fundamental differences in accepting provincial legislation as a means to meet or improve present capacity and service. Many of the First Nation political organizations will oppose any attempts by Ontario government to enact provincial legislative measures over First Nations policing. NAN is unique to this particular conundrum. Ontario is a signatory to Treaty # 9, therefore NAN is in a position to negotiate legislative undertakings that respond to their peculiar needs. In this case, NAN would negotiate a special recognition clause within the Act that specifically states that Ontario recognizes the First Nations to design, develop, control and implement policing as recognized under section 35 of the Constitution Act of Canada. This recognition, along with reference that amendments to the Police Services Act be a transitory mechanism to the First Nations own legislation.⁴³

The Nishnawbe Aski Nation participated in discussions with the federal and provincial governments, as far back as 1994, to examine ways to devise a better legislative framework for First Nation policing. The discussions produced several alternatives, the best of which was thought to be complementary federal and provincial statutes. There were no such changes, however, mainly because the governments were not prepared to bring forward legislation.

The time has come for the federal and provincial governments to provide First Nations policing with a secure legal foundation. I recommend, therefore, that the federal, provincial and First Nation governments Ontario jointly commit to providing a secure legislative basis for First Nation police services in Ontario. The best approach may very well be complementary federal and provincial statutes. The federal and provincial governments should develop an appropriate model with the full participation of First Nations in Ontario.

I want to emphasize, however, that the provincial government does not have

to wait for the federal government to take steps to improve the legal status of First Nations police services in Ontario.

There is an interesting precedent in the field of child and family services, which may translate well to First Nation policing. The provincial *Child and Family Services Act (CFSA)* recognizes that Native people should be entitled to provide their own child and family services. It states that all services to Native people should recognize their culture, heritage, and traditions, and provides that a First Nation may designate a body to be a child and family service authority. It also empowers the minister to enter into negotiations and agreements for the provision of services where a First Nation designates such a body.⁴⁴

An equivalent approach in First Nation policing would see the provincial government enact legislation recognizing the right of First Nations to provide their own policing. The purpose of these provisions would be to allow a First Nation to opt in to all or parts the existing provincial *Police Services Act* or to some form of stand-alone provincial First Nation policing legislation. This would allow an individual First Nation and First Nation police service to establish a more secure legal foundation in areas already covered in the *Police Services Act* or in areas that might be addressed in new legislation.

It would be important that the application of this legislation not be mandatory for First Nations or First Nation police services. Any potential *Police Services Act* amendment or stand-alone legislation must acknowledge the right of individual First Nations to choose to follow all or parts of the provincial legislative scheme. This would promote flexibility and would acknowledge that a uniform approach to First Nation policing is not appropriate. This would also promote negotiations between the province and individual First Nations on the applicability of specific legislative provisions and any provincial government concerns or conditions.

The *CFSA* example shows that provincial First Nation policing legislation could be successful in the right circumstances. Interestingly, I have been advised that the provincial government, Nishnawbe Aski Nation, and NAPS have been discussing a similar approach for NAPS for some time.

I believe that this is an option worth exploring. It may provide all or part of the secure legal foundation that First Nation police services need. As a result, I recommend that the provincial government work with the Nishnawbe Aski Nation, NAPS, and other First Nations in Ontario as appropriate to develop a “made in Ontario” legislative or regulatory framework for First Nation policing in Ontario.

Of course, provincial First Nation policing legislation could be subject to constitutional challenge on the grounds that it infringes upon the federal government

authority with respect to First Nations. I note, however, that the *CFS*A provisions have been in place for a long time without challenge. Nor has there been a challenge to the provincial *Police Services Act* section conferring appointment powers on the commissioner of the OPP. This section has been in place for more than a decade. Finally, the new legislation would be permissive, not mandatory for First Nations. This would make a constitutional challenge more difficult.

Another obvious and straightforward step that could be taken by the provincial government would be to amend the *Police Services Act* to allow a First Nation police service or board to appoint its own officers. There is no good rationale for giving this power to the commissioner of the OPP.

Of course, First Nations that choose not to follow the new provincial legislative framework will also need a more secure legal foundation. I therefore encourage Canada, Ontario, and First Nations to develop alternative arrangements. Perhaps the existing agreements could be improved to address the most important issues. Or, the federal government could decide to follow Ontario and develop a complementary or alternative legislative framework. I am hopeful that Canada, Ontario, and First Nations will agree on measures to ensure that First Nation policing has a more secure legal foundation.

Finally, Canada, Ontario, and First Nations need a venue where they can conduct real and meaningful dialogue on what NAPS called “measures to increase public security and community harmony.”⁴⁵ In that regard, it seems to me that the province will need an ongoing, professional forum for discussing policing with First Nations. At the national level, there is a First Nations Chiefs of Police Association. A similar body at the Ontario level could provide professional advice to the government and the OPP, as well as to other police services. I see value in such a forum in areas such as working on policing standards, the legislative framework, protocols and planning for public order events, officer recruitment, training, development, and many other matters of shared concern. I believe, therefore, that the provincial government, First Nation police services, and the OPP should jointly establish an Ontario First Nation Chiefs of Police Association.

10.4.3 Funding

The funding formula for First Nation police services in Ontario under the FNPP seems to be based on the assumption that basic policing will be provided to First Nations by the OPP. For funding purposes, therefore, First Nation police services are regarded as enhancements to the OPP. This means that the funds are mainly for additional officers and modest administrative support. Funding is not intended to pay for the whole apparatus of policing, including buildings, equipment,

specialized units, legal services, and so on. The reality of First Nation police services in Ontario proves that this assumption is incorrect.

According to the FNPP, “[c]alculating the costs of a policing arrangement for a community should be consistent with the calculation of costs for policing arrangements in other communities with similar conditions in the region.” This provision leaves unanswered the question of what constitutes “similar conditions in a region.” Does it mean similar conditions in a First Nation police service or in a mainstream police service? The distinction is significant, because First Nation police services are typically expected to respond to the unique conditions of their communities, including the lack of social service supports for mental health and domestic violence cases, higher unemployment, and intra-band disputes. If anything, First Nation police services need comparatively more funding than mainstream police services do, not less.

The OPP regards First Nation police services as primary service providers.⁴⁶ For that reason, the OPP asked me to “recommend increased funding for First Nation police services and those police services which deliver services to the First Nation communities, so that they can help in building community capacity.”⁴⁷

Our research, consultations, forums, and submissions from the parties have consistently confirmed that First Nation police services are working with restricted budgets and substandard facilities, which frustrates their efforts to provide high quality police services.

The funding model must reflect the realistic needs of First Nation communities and First Nation police services. Yet, the reality of First Nation policing is very different from the conditions assumed in the current funding model. First Nations, Aboriginal peoples, and the police services themselves want and expect First Nation police services to provide service of high quality and at a high level. Simply put, this means more capital and operational funding.

As I commented earlier, this problem does not exist only in Ontario. Since it originates in the national First Nations Policing Policy, it affects First Nation police services across Canada. The policy and the funding arrangements should be changed.

The comparative lack of capital and operational funding for First Nation police services has significant consequences in a number of areas, including their ability to recruit and retain qualified police officers, respond to occupations and protests, provide professional, efficient police services, train and support their officers, and meet even basic capital and infrastructure requirements. A recent assessment by Public Works Canada (2005) rated one-third of all self-administered police facilities in Ontario as “poor” and another 40% as only “fair.”⁴⁸

For First Nation officers, the stress of policing their own communities, the isolation of one or two-person postings, the lack of housing, and poor facilities often lead to burnout and high turnover.⁴⁹ Unfortunately, First Nation police services do not have the resources to offer counselling support for their officers or to provide coach officers to guide new recruits.

NAPS explained the effect of financial constraints at length in its submission to the Inquiry.⁵⁰ The submission summarized the areas in which investment is needed to move toward a “fully functioning police service,” including the following:

- Up-to-date capital infrastructure at all sites
- Operational capacity to respond to confrontations, blockades, and protests
- Communications and public liaison
- Full-time coach officers to guide new recruits
- Auxiliary police program
- Professional counseling for officers and their families.⁵¹

The need for more resources for First Nation officer training is particularly acute in the field of peacekeeping and dispute resolution, especially given the trend in recent years toward more intra-band conflict. Don Clairmont wrote that more training in this field appeared to be a major concern for officers and First Nation leaders, “recognizing that just because they are First Nation people does not automatically give them appropriate skills and dispositions but also holding that this is an area of policing where they can ‘bring something to the table’ in their collaboration with the OPP.”⁵²

Finally, First Nation chiefs and police service leaders told the Inquiry that the uncertainty of funding negotiations with Canada and Ontario is a great burden. Often, new agreements are signed only after existing agreements have expired, putting the police services under cash flow pressure.

Better financial support for First Nation police services is necessary to protect community safety, ensure sustainable, professional policing, encourage culturally appropriate policing and peacekeeping, and promote and protect public order in vulnerable communities. The federal and provincial governments should therefore increase capital and operational funding for First Nation police services in Ontario to allow those services to better meet the urgent and diverse needs of their communities. Such funding should be secured by renewable, five-year agreements between the federal, provincial, and First Nation governments.

10.4.4 Governance and Accountability

The research in the course of the Inquiry profiled several Ontario First Nation police services and considered the structure and role of their police commissions. As I noted earlier, the legislative basis for the First Nation police services is minimal. Thus, unlike municipal services or the OPP, their governance arrangements are not prescribed (or protected) by law. This raises several important issues that affect the quality, sustainability, accountability, and credibility of First Nation police services:

- First Nation police commission members and band councils lack legislative protection and are liable for the civil damages and financial deficits that may arise from policing.
- The policing standards established by the Ontario *Police Services Act* do not apply to First Nation services.
- There is no formal requirement or process for dealing with citizen complaints about policing.
- The Special Investigation Unit (SIU) does not have authority to investigate death or serious injury arising from First Nation policing, an authority it does have with respect to the OPP and municipal police services.
- There is no requirement to publish information about policing results.

It is beyond the mandate of this Inquiry to make recommendations on the complex issue of specific governance arrangements for First Nation police services. Nevertheless, I urge the federal and provincial governments to work with individual First Nations and provincial First Nation organizations to consider how to address these issues for the benefit of First Nation communities, First Nation police services, and all Ontarians.

Recommendations

56. The federal and provincial governments should update their policies on First Nation policing to recognize that self-administered First Nation police services in Ontario are the primary police service providers in their communities.
57. The provincial government, OPP, and First Nation police services should work together to identify how the provincial government can support First

Nation police services to be as effective as possible when policing Aboriginal occupations and protests, either within their own territories or in support of the OPP or other police services in Ontario. The OPP and First Nation police services should engage in joint planning and training for Aboriginal occupations and protests and existing protocols should refer to occupations and protests.

58. Federal, provincial, and First Nation governments should commit to developing long-range plans for First Nation policing in Ontario.
59. Federal, provincial, and First Nation governments should commit to developing a secure legislative basis for First Nation police services in Ontario.
60. The provincial government should work with the Nishnawbe Aski Nation, the Nishnawbe-Aski Police Services, and other First Nations in Ontario as appropriate to develop a “made in Ontario” legislative or regulatory framework for First Nation policing in Ontario. The provincial government should also amend the *Police Services Act* to allow First Nation police services or boards to appoint their own officers.
61. The provincial government, First Nation police services, and the OPP should establish an Ontario First Nation Chiefs of Police Association.
62. The federal and provincial governments should increase capital and operational funding for First Nation police services in Ontario. This funding should be secured by renewable, five-year agreements between the federal, provincial, and First Nation governments.

Endnotes

- 1 Canada. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), p. 57.
- 2 Don Clairmont, "Aboriginal Policing in Canada: An Overview of Developments in First Nations" (Inquiry research paper).
- 3 Clairmont, pp. 43-127. For the purpose of analysis, the study divided the police services into four types: (1) the full-service town model: Six Nations and Akwesasne (both Ontario); (2) the niche model: Wikwemikong (Ontario), Huron-Wendake, and T'suu T'ina; (3) the regional model: Nishnawbe-Aski and Anishnabek (both Ontario); and (4) the micro-transitional model: Timiskaming and Whapmagoostui.
- 4 Chiefs of Ontario, Special Assembly with the Ipperwash Inquiry, March 9, 2006. (Inquiry event).
- 5 Ibid.
- 6 Chiefs of Ontario Part 2 submission, p. 63.
- 8 Ibid., p. 7.
- 9 Clairmont, p. 10.
- 10 Ibid., pp. 7-14.
- 11 Ibid., p. 18. See also pp. 6-11, where Professor Clairmont provides a detailed chronology of the development of First Nations policing.
- 12 Department of Public Safety and Emergency Preparedness Canada, "First Nations Policing Policy," <<http://www.psepc-sppcc.gc.ca/pol/1e/fnpp-en.asp>>.
- 13 Ibid.
- 14 Data provided at the request of the Inquiry by the Aboriginal Policing Directorate, Public Safety and Emergency Medical Preparedness Canada, December 13, 2006, and the Ontario Ministry of Community Safety and Correctional Services, Public Safety Division, December 20, 2006 (on file with the Inquiry).
- 15 Clairmont, pp. 31-32.
- 16 Ibid., p. 31.
- 17 Clairmont, p. 32. Professor Clairmont reported that "[Federal] Aboriginal Policing Directorate officials have indicated in interviews that self-administered [police services] in Ontario on the whole represent the success of the First Nations Policing Policy. As two such officials stated, 'Ontario is our strongest.' The self-administered [police services] in Ontario have indeed experienced reasonable stability and steady growth in complement. The contrast in these regards to self-administered [police services] elsewhere in Canada outside Quebec is notable."
- 18 Ibid. See particularly pp. 49-51, 64-5, 69, and 100.
- 19 Ibid., p. 64.
- 20 Ibid., pp. 26-7.
- 21 Gwen Boniface, testimony, June 14, 2006, Transcript pp. 19-24.
- 22 OPP Part 2 submission, pp. 29-30.
- 23 Clairmont, p. 37.
- 24 OPP Part 2 submission, p. 28.
- 25 Don Clairmont and Jim Potts, "For the Nonce: Policing and Aboriginal Occupations and Protests" (Inquiry research paper), p. 86.
- 26 Nishnawbe-Aski Police Services Board Part 2 submission, p. 12.

- 27 Clairmont and Potts, p. 36.
- 28 The Union of Ontario Indians submission, p. 4.
- 29 See, for example, Nishnawbe-Aski Police Services Board, “Confrontations over Resources Development,” (Inquiry project), p. ii: “NAPS does not have the capacity to respond to direct action challenges of First Nations.”
- 30 OPP Part 2 submission, p. 48.
- 31 Chiefs of Ontario Special Assembly with the Ipperwash Inquiry, March 9, 2006.
- 32 Clairmont, p. 32. This happened in Alberta, Manitoba, and Nova Scotia when self-administered First Nation police services ran into difficulties.
- 33 Ontario Secretariat for Aboriginal Affairs, “Ontario’s New Approach to Aboriginal Affairs,” <<http://www.aboriginalaffairs.osaa.gov.on.ca/english/news/brochure.html>>.
- 34 Chiefs of Ontario Special Assembly with the Ipperwash Inquiry, March 8, 2006.
- 35 Nishnawbe-Aski Police Services Board, pp. 77-96.
- 36 Ibid., p. 82.
- 37 Ibid., p. 89.
- 38 Clairmont, p. 33.
- 39 Chiefs of Ontario Special Assembly with the Ipperwash Inquiry, March 9, 2006. Chief Simon Fobister told the Assembly that “the lack of legislative recognition of First Nation police services allows the governments to continue recognizing the First Nation police services as just a program.”
- 40 Nishnawbe-Aski Police Services Board, p. 85.
- 41 OPP Part 2 submission, pp. 48-9.
- 42 Section 54 (2) of the *Police Services Act* states that “If the specified duties of a First Nation Constable relate to a reserve as defined in the *Indian Act* (Canada), the appointment also requires the approval of the reserve’s police governing authority or band council.”
- 43 Nishnawbe-Aski Police Services Board, p. 86.
- 44 *Child and Family Services Act*, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c11_e.htm#BK1>.
- 45 Nishnawbe-Aski Police Services Board Part 2 submission, p. 6.
- 46 OPP Part 2 submission, p. 50.
- 47 Ibid., p. 49.
- 48 Clairmont, p. 34.
- 49 Nishnawbe-Aski Police Services Board, pp. 88-90.
- 50 Since it serves a huge region, the Nishnawbe-Aski Police Services must contend with much higher travel costs than municipal police do. NAPS also faces a high attrition rate among its officers. The stress of postings in isolated locations contributes to the high turnover. Moreover, once trained, many officers apply for policing positions in the southern parts of the province, where pay and conditions are better. The governing board of NAPS adopted the standards set by the *Police Services Act*, even though the legislated standards are not mandatory for First Nation police services, because the board believed that the communities it served were entitled to the same quality of policing as non-Aboriginal communities were. As a result, training for officers became a major expenditure.
- 51 Nishnawbe-Aski Police Services Board, p. 97-98.
- 52 Clairmont, p. 51.

BIAS-FREE POLICING

The attitudes of police and Aboriginal peoples toward each other can be a major factor in whether a protest will remain peaceful or become violent. Problems may occur when the people facing each other see negative stereotypes instead of individuals.

Many members of the OPP who testified at the Inquiry understood the complexities of situations where Aboriginal people are engaging in a collective assertion of their rights. However, other members of the OPP showed a disappointing lack of general knowledge and understanding of Aboriginal peoples.

Ipperwash is a paradox for the OPP. On the one hand, the OPP acknowledged that the shooting death of Dudley George left a tragic mark that has “significantly and negatively impacted upon the relationship between the OPP and the Aboriginal community, requiring constant work and renewal.”¹ On the other hand, Ipperwash has been a catalyst for significant, constructive changes within the OPP and in its relationship with Aboriginal peoples.

The OPP initiatives in this field are a work in progress, however. Much has been accomplished, but much more remains to be done to ensure that these programs are both sustainable and effective.

The responsibility for police/Aboriginal relations does not rest with the OPP alone. The provincial government has an equally important responsibility to promote better police/Aboriginal relations throughout the province. Fulfilling that responsibility is particularly important now, because of the potential for more occupations and because the responsibility for policing Aboriginal peoples is gradually but inevitably spreading from the OPP to other police services in Ontario. These developments suggest that the province, building on the foundation established by the OPP, should take a leadership role in developing province-wide skills, best practices, capacity, and resources to improve police/Aboriginal relations.

Another component of police/Aboriginal relations is the issue of dealing with complaints and discipline related to the police. The provincial government recently introduced Bill 103, the *Independent Police Review Act, 2006*, in response to the LeSage Report.² The legislation implements the key recommendations arising from Justice LeSage’s recent review of the police complaints system in Ontario. Bill 103 gives the provincial government and the OPP and other police services an opportunity to address, fairly and systematically, allegations or complaints about inappropriate or racist police behaviour.

I am confident that the proposed legislative reforms set out in Bill 103, combined with the reforms I recommend herein, represent a comprehensive, achievable, and effective plan for improving police/Aboriginal relations in Ontario.

11.1 Learning from Ipperwash

The existence of cultural insensitivity and racism within the OPP was evident at Ipperwash. It created a barrier to understanding and thus made communication and trust-building more difficult.

Perhaps the most egregious incident was the conversation between Detective Constable Darryl Whitehead and Constable Jim Dyke on September 5, 1995, the day before Dudley George was shot and killed. These two officers were part of an undercover intelligence team when they made the following comments:

Dyke: No, there's no one down there. Just a big, fat fuck Indian.

Whitehead: The camera's rolling.

Dyke: Yeah. We had this plan, you know. We thought if we could five or six cases of Labatt's 50, we could bait them.

Whitehead: Yeah.

Dyke: And we'd have this big net at a pit.

Whitehead: Creative thinking.

Dyke: Works in the south with watermelon.

The Inquiry heard offensive comments from other OPP officers during the occupation. The Inquiry also learned of other activities after the occupation, including the production and distribution of offensive commemorative coffee mugs and t-shirts.

Another example of racism towards Aboriginal people in the period before Dudley George's death was the Ontario Ministry of Natural Resources' race-specific enforcement policy, "Procedures for Dealing with First Nations People." This policy was issued in August 1995 for the Pinery and Ipperwash Provincial Parks.

The lessons from these incidents have important implications for this Inquiry.

First, the evidentiary record makes it clear that Constable Dyke was not the only officer holding insensitive views about Aboriginal people. This suggests that cultural insensitivity and racism was not restricted to a few "bad apples" within the OPP but was more widespread. An organizational problem requires an organizational-wide solution. An important lesson of Ipperwash, therefore, is that the OPP must tackle the issue of racism within its ranks directly and comprehensively.

There are many reasons why this is important, not the least of which is that successful, peaceful resolution of Aboriginal occupations and protests often depends upon the OPP's ability to understand and build trusting relationships with Aboriginal protesters. During his testimony at the evidentiary hearings, former Chief of the Assembly of First Nations Ovide Mercredi correctly observed that

[r]acial taunts by police officers on duty is counterproductive to the goal of non-violent resolution via dialogue.

Creating these types of commemorative items does nothing to restore normal relations between the Aboriginal community and the police and in fact it does the opposite.³

I discuss the OPP's policies and initiatives to address these issues in detail in this chapter.

A second important lesson is the need for the provincial government to assume a share of the responsibility for bias-free policing in the OPP and other police services or law enforcement agencies across Ontario. Robert Runciman, Ontario Solicitor General at the time of Ipperwash, agreed that racism among police officers is a very serious matter for police officers, and that it is very important that officers be made aware that racism on a police force will not be tolerated. He further agreed that one of the responsibilities of a Solicitor General should be to ensure that this policy is in place.⁴

A third important lesson concerns how and when police officers should be disciplined for inappropriate or racist language or conduct. In my view, the OPP's response to the incidents described above was insufficient. Officers either were subject to internal, informal disciplinary processes or were not disciplined at all. These circumstances call into question the disciplinary regime for this kind of conduct and the internal mechanisms within the OPP for reporting it.

11.2 The Evolution of Police/Aboriginal Relations

The OPP is not the only police service in Canada to address police/Aboriginal relations and racism in policing. Many initiatives, at both the national and local level, have been dedicated to improving the policing of Aboriginal communities. For example, the Canadian Association of Chiefs of Police (CACP) adopted a "bias-free policing" policy at its 2003 Annual Conference.⁵ The RCMP, the largest police service in Canada, has adopted a similar policy and has initiated many programs directed to improving its practices in policing Aboriginal peoples.⁶ The RCMP programs are noteworthy given its status as the national police service

and in light of its historically turbulent relationship with Aboriginal peoples.

The OPP, the RCMP, the Canadian Association of Chiefs of Police and others recently established the Law Enforcement Aboriginal and Diversity Network (LEAD).⁷ The goals of this national organization include identifying and distributing best practices in the policing of Aboriginal communities and other culturally distinct communities. In 2006, LEAD organized a major national conference, largely dedicated to discussing racial profiling, recruitment and retention of Aboriginal officers, culturally competent policing, and police/community relationship-building.

Despite these positive developments, the Inquiry heard consistent criticisms pointing to biased or racist policing—from Aboriginal witnesses, in the research papers and projects submitted to the Inquiry, at our Youth and Elder Forum on Police/Aboriginal Relations, at several of our consultations, at the Chiefs of Ontario Special Assembly with the Inquiry, in the submissions of the Aboriginal parties to the Inquiry, and at the recent LEAD conference.⁸

11.2.1 Previous Inquiries

Police/Aboriginal relations have been the subject of several inquiries in Canada over the past two decades:

- Marshall Commission (Nova Scotia, 1989)
- Aboriginal Justice Inquiry of Manitoba (Manitoba, 1991)
- Cariboo-Chilcotin Justice Inquiry (British Columbia, 1993)
- Blood Tribe Policing Inquiry (Alberta, 1991)
- Report of the Osnaburgh/Windigo Tribal Justice Review Committee (Ontario, 1990)
- Bridging the Cultural Divide — A Report on Criminal Justice and Aboriginal People in Canada by the Royal Commission on Aboriginal Peoples (Canada, 1996)
- Commission of Inquiry into the Shooting Death of Leo LaChance (Saskatchewan, 1993)
- Saskatchewan Commission on First Nations and Métis People and Justice Reform (Saskatchewan, 2004)
- Inquiry into the Death of Neil Stonechild (Saskatchewan, 2004)⁹

Several of these inquiries were called after the death of an Aboriginal person, in

some cases at the hands of the police. In other cases, an inquiry was called to investigate the police response to such a death.

These reports and others have concluded that police services have a systemic bias against Aboriginal peoples. The fact that inquiries have been held in at least six provinces demonstrates that problems in police/Aboriginal relations are neither restricted to one province nor are they isolated incidents. Each of the inquiries I have listed recommended systemic reforms to police/Aboriginal relations, and several also recommended significant reforms to the broader justice system.

Our literature review and the survey conducted by Professor John Hylton examined these reports in some detail. Professor Hylton summarized the best practices and recommendations identified:

- Police leadership must support and model strong diversity policies;
- Police recruitment screening must be designed to eliminate racist candidates with racist views;
- A proactive Aboriginal recruitment strategy must be maintained over time with a goal of police service membership mirroring the community make-up;
- Employment and family assist care programs, as well as other programs for Aboriginal police members, must be provided in order to support full participation in an historically hostile system;
- Increased emphasis must be placed on cross-cultural training for recruits and experienced police service members, using Aboriginal police officers in an experiential environment (not through academics, advocates or other Aboriginal leaders).¹⁰

Many of these reports also stressed the importance of First Nation police services.

One of the notable findings of the literature review was the general lack of research, documentation, or evaluation regarding police/Aboriginal relations programs or practices. Given the twenty years of initiatives and inquiries in this area, this significant gap in the analysis of these programs is disappointing and surprising.¹¹

11.2.2 Aboriginal Peoples and Policing

Inquiries and other reports have emphasized the history of mistrust between Aboriginal peoples and the police. At the risk of oversimplification, that mistrust is rooted in

- The legacy of colonialism
- The role of the police in attempts to assimilate Aboriginal peoples
- Government reliance on the police to resolve Aboriginal rights disputes
- Over-representation of Aboriginal people in the criminal justice system
- Racism on the part of the police

The Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform (2004) summed up the consensus of many Canadian inquiries and reports: “[R]acism is a major obstacle to healthy relations between the First Nations and ... police organizations.”¹² The Supreme Court of Canada has also acknowledged racism and systemic discrimination against Aboriginal peoples.¹³

Participants at many of our consultations and community forums echoed this conclusion, as did many of the submissions to the Inquiry, including that of the Chiefs of Ontario:

On March 9, 2006 Chief Simon Fobister of the Grand Council Treaty #3 could not have stated things more clearly when he said:

It is one thing to forgive and move forward but when unnecessary deaths of our people continue to happen in this day and age, there is never any moving forward, just the recurring memories of seeing our parents humiliated and our sense of helplessness as children at how society views the ‘original people of this land’. But, we are survivors of our nation, and while we still have many struggles to overcome, we are prepared to work together with you to make the changes that are necessary so we can all live together in peace and harmony.¹⁴

The Union of Ontario Indians also made a similar point in its submission:

Whether or not OPP and MNR enforcement activities within First Nations are carried out differently than in non-native communities is obviously debatable but it is clear that the prevailing feeling within First Nations communities is not up for debate. Many First Nations people believe that situations are often unnecessarily escalated because of the lack of understandings by tactical units or responding officers toward the people they are dealing with.

This attitude has been amplified by incidents that denigrate the very people the OPP have sworn to serve. Isolated events including the creation of trophies by members of the tactical unit at Ipperwash, the revelation of racist e-mails being distributed in northern Ontario and the event previously described at the Chippewas of the Thames only reinforce prevailing attitudes for some First Nations people.

The pattern of incidents across Ontario in the past ten years is deeply disturbing. While it must be acknowledged that efforts are being made and that many leaders, most notably Commissioner Boniface of the OPP, are providing leadership on bridging the gulf that exists between law enforcement agencies and First Nations people, there is much more that has to be done.¹⁵

The Kettle and Stony Point First Nation submission recognized some progress, but pointed to the need to do more:

Major strides have been made since the 1970's in providing more, and more appropriate policing services to Aboriginal communities. Without diminishing those achievements in any way, this Inquiry has learned that more needs to be done. The most urgent need is to eradicate the twin malignancies of racism and stereotyping from the realm of law enforcement.¹⁶

Finally, participants at our Youth and Elder Forum on police/Aboriginal relations related many negative personal experiences with the police to underscore their view that the police treat Aboriginal people more harshly than they treat non-Aboriginal peoples. Many participants said that the police stereotype Aboriginal people and that racial profiling influences police in stopping and questioning them. In their experience, teachers and store clerks also tend to treat Aboriginal peoples differently. Participants further pointed out that the jails and courts are full of Aboriginal people, mostly because of charges related to alcohol and drugs, and that Aboriginal people are considered guilty until proven innocent. According to many participants, the lack of communication between the police and Aboriginal people, the perception that police stereotype Aboriginal people and use racial profiling against them, and the systemic discrimination against Aboriginal people in the justice system have combined to incite widespread anger in Aboriginal youth.¹⁷

11.3 The Ontario Provincial Police

11.3.1 *OPP Initiatives*

I have noted that the OPP is the police service most likely to be involved in an Aboriginal occupation or protest. The OPP made extensive submissions to the Inquiry on the details of programs and strategies to promote relationship-building with Aboriginal communities, including detailed presentations at its two-day “Building Relationships” forum at the Inquiry in January 2006.¹⁸ In chapters 9 and 10, I described the diversity and depth of some of these programs—the role of the Aboriginal Liaison – Operations Officer, Aboriginal Relations Teams, the Framework for Police Preparedness for Aboriginal Critical Incidents, and OPP support for First Nation policing.

In addition to those programs and policies, the OPP has undertaken further initiatives intended, in whole or in part, to promote better relationships with Aboriginal peoples:

- Organizational planning and policies, such as the OPP Promise, the Focus On Professionalism, Mission Critical Issues, business planning processes, and police orders
- Initiatives to recruit, retain, support, and promote Aboriginal officers, including Aboriginal outreach and inreach initiatives, Aboriginal-specific promotion criteria, and the Aboriginal Officers Leadership Forum
- Native Awareness Training
- Community outreach initiatives, including Zhowski Miingan or Blue Wolf, traditional Aboriginal drum groups, the OPP Youth Summer Camp, and Police Ethnic And Cultural Exchange (PEACE)

11.3.2 *The OPP Promise, Mission Critical Issues, Police Orders, and Business Planning*

The OPP reported that the core of its multiyear strategy and vision is “The OPP Promise,” which defines values and ethical standards that best characterize the future of the organization. It is the cornerstone of the core strategy of the OPP, the “Focus on Professionalism.”¹⁹

The Focus on Professionalism identifies several “Mission Critical Issues” that support the core business of the OPP, including Relationship Building with Aboriginal Communities, Meeting the Needs of Diverse Communities, and Professionalism. The OPP implements its values and Mission Critical Issues by embedding them in its operations through its three-year business planning cycle. The

business plan then articulates initiatives that advance the Mission Critical Issues.²⁰

The 2005-2007 Mission Critical Issues document describes the OPP relationship with Aboriginal peoples as a “core business of the organization.” The OPP identified the following reasons for this priority:

- In the areas policed by the OPP, Aboriginal people are the single largest identifiable minority group with their own communities.
- For the foreseeable future, the OPP will be called upon to provide policing services during difficult situations.
- Within the last ten years, the OPP has been involved in a number of critical confrontations with Aboriginal persons and there must be continuous learning.
- The safety of officers and the public and effective policing depends on effective relationships and communications.
- Policing Aboriginal communities is becoming increasingly complex, requiring understanding across a widening spectrum of social, cultural, political, and legal issues.²¹

The OPP submitted that these initiatives “represent [its] commitment to ‘strong diversity policies’ identified by Professor Hylton as a best practice.”²²

11.3.3 Recruitment and Retention of Aboriginal Officers

OPP initiatives in the area of recruitment and retention fall into three categories: ensuring that potential recruits with racist attitudes are screened out during the recruitment process,²³ “outreach” initiatives designed to encourage Aboriginal people to consider a career in the OPP,²⁴ and “inreach” initiatives designed to support and promote Aboriginal officers within the OPP.²⁵

In 1995, there were forty-nine self-identified Aboriginal officers in the OPP. By 2006, this number increased to 135, including two superintendents, out of the approximately 5,500 uniformed members of the OPP.²⁶

The OPP submitted that its outreach and inreach activities are significant components of the “proactive recruitment strategy” which Professor Hylton identified as a best practice.²⁷

11.3.3.1 Training

The OPP stated that the “centrepiece” of its initiatives to address racism is its Native Awareness Training program.²⁸ As of August 2006, more than 2,000 OPP members have participated in the one-week course.

According to the OPP, Native Awareness Training is “only part of a larger strategy to select and train officers in a way that both enhances awareness of Aboriginal culture and sensitivity, and roots out racism.”²⁹ Other initiatives include:

- Screening of recruits includes processes designed to eliminate candidates with racist views.
- The one-week orientation for successful recruits at the OPP Academy includes a half-day of training on Aboriginal issues.
- After completing Basic Training, recruits return to the OPP Academy for four weeks. Two days of the program are devoted to Aboriginal issues.
- During the probationary period, OPP officers job-shadow a First Nation police officer for two weeks.
- OPP promotion boards ask the candidates questions about Aboriginal issues and the Framework.
- Aboriginal-specific testing and training is included in the selection process and training for integrated response units (crisis negotiators, incident commanders, and members of ART, ERT, TRU).
- Intelligence personnel and members of the Professional Standards Bureau receive Native Awareness Training.

According to the OPP, it is “unique in mandating this level of Native Awareness Training for integrated or emergency response officers.”³⁰

11.4 Assessing the Police/Aboriginal Relations Programs of the OPP

The police/Aboriginal relations initiatives of the OPP are impressive in their breadth and depth. These programs represent a comprehensive strategy to improve relationships between the OPP and Aboriginal peoples, especially when combined with the OPP initiatives regarding policing occupations and First Nation policing.

Former OPP Commissioner Gwen Boniface showed commitment and leadership in improving OPP relations with the Aboriginal community. Many individual Aboriginal and non-Aboriginal OPP members have developed programs, built community relationships, or have otherwise contributed to improving police/Aboriginal relations. To its credit, the OPP has taken significant, positive strides since Ipperwash, and I was impressed by all of these efforts.

For the most part, I believe that the OPP police/Aboriginal relations initiatives conform to the best practices identified in previous inquiries and reports.

In particular, I commend the manner in which Aboriginal issues and police/Aboriginal relations are incorporated in Mission Critical Issues and business planning. I also commend the commitment to Native Awareness Training and to outreach and inreach programs. These are important, constructive programs that should improve the relationship of the OPP with Aboriginal peoples in Ontario. I therefore recommend that the OPP maintain these initiatives and accord them a high priority with the organization. The OPP should also devote a commensurate level of resources and executive support to them.

I think it fair to say that Aboriginal parties at the Inquiry supported these policies and initiatives in principle, but they were concerned about implementation or acceptance at the detachment level. Many Aboriginal parties to the Inquiry also asked whether the internal policies or discipline processes were effective in identifying or reprimanding inappropriate behaviour. These and other important questions remain to be addressed, and they involve challenges in both sustainability and effectiveness.

11.4.1 Sustainability

The challenges to the sustainability of the police/Aboriginal relations strategy of the OPP and its related initiatives are essentially the same as they are for its Framework-related initiatives: They are recent, they rely on a small number of officers to carry a significant portion of the burden of design and implementation, and they do not have secure funding.³¹

These challenges are significant. The combination of financial and human challenges raises questions about how these programs are to be secured, supported, and promoted in the long run. I believe that a successful response to these challenges depends on a combination of provincial government support and further measures by the OPP. Provincial government action is crucial, since the provincial government can provide the most significant institutional support for these programs. For its part, the OPP should also take steps to improve the sustainability of its police/Aboriginal relations strategy and programs by

- Developing active, ongoing monitoring strategies, including comprehensive evaluation strategies and improved data collection
- Improving participation by First Nations and Aboriginal peoples in program design, oversight, and evaluation
- Improving transparency and accountability

These are appropriate next steps for the OPP to take to ensure that its strategy and programs are as secure and effective as possible.

11.4.2 *Effectiveness*

Again, the sustainability of a program depends, to a critical degree, on its effectiveness. Thus, the sustainability of these initiatives will depend on whether the OPP can demonstrate that they effectively improve police/Aboriginal relations. Fundamental to the determination of effectiveness is the development of an ongoing, active monitoring and implementation program to continually assess whether a program is working at every level of the organization.³²

Ongoing monitoring can include a variety of techniques and strategies, such as evaluations, data collection, and partnerships and consultation with the communities affected. Active, ongoing monitoring is particularly important for these initiatives because they are in the relatively early stages of development.

11.4.2.1 *Evaluations*

The independent, third-party evaluations I recommend with respect to the OPP Framework for Police Preparedness for Aboriginal Critical Incidents and its ART program would also be appropriate, in my view, for its Native Awareness Training program. The OPP describes this program as the “centrepiece” of its police/Aboriginal relations program, and it has potential far-reaching and long-term benefits for the OPP, Aboriginal peoples in Ontario, and police/Aboriginal relations. An independent evaluation of this program is also important because there is little quantitative data about what does or does not work in police/Aboriginal relations.

Training is a crucial element of any organizational change strategy, and the Native Awareness Training program is a significant initiative. However, training is only one element of a comprehensive strategy. The key issue is whether it leads to changed attitudes and practices in policies and processes. An independent evaluation is crucial in this regard. Data from evaluation is also important to ensuring the continuation of such programs. A demonstrably effective program is much less vulnerable to funding cuts or changes in government or organizational leadership than an unproven one is. There is a similar need for an independent evaluation of the OPP recruitment and promotion practices.

The OPP is currently collecting data on the number of self-identified Aboriginal members of the force, and it has begun an independent, longitudinal study on new recruits which will look at three recruit classes over a five-year period. The OPP is also beginning a more comprehensive internal analysis of its Native awareness programs. To its credit, the OPP has also said that it “would welcome input and guidance from the First Nations leadership on developing assessment tools to evaluate the application of the Framework.”³³ Presumably,

the OPP would welcome similar input on other police/Aboriginal relations programs as well.

These are important and necessary first steps. The next step for the OPP should be to develop a comprehensive evaluation strategy for all of its significant police/Aboriginal relations initiatives, including an independent, third-party evaluation of its Native Awareness Training and recruitment initiatives. This strategy should be developed in partnership with the Aboriginal community in Ontario.

11.4.2.2 Data Collection and Statistics

In my view, data collection is a fundamental tool in improving police/Aboriginal relations and ensuring bias-free policing. Data collection is needed to determine whether well-intentioned programs and policies actually produce constructive results, and whether activities and decision-making within an organization conform to its own policies, orders, best practices, and expectations. It can also play an important educational role within a police service and improve public perception of its trustworthiness and accountability.

In policing, data collection is sometimes associated with racial profiling. This association is too narrow. Data collection and statistics can be used to study a much wider range of activities.

Recently, there has been much discussion in Ontario over the publication of a data collection study of racial profiling by the Kingston Police Department. The Kingston project was designed to gather race and ethnicity data on pedestrians or motorists interrogated, suspected, questioned, searched, or detained by Kingston police officers.³⁴ Kingston Chief of Police William Closs explained the project:

This project grew out of our genuine interest in addressing the issue of racial profiling in policing; our conscious decision to take action that would result in more positive contacts with citizens; and the need to respond appropriately to, rather than dismissing, citizens' perceptions and anecdotal stories. This was an honest effort to move beyond denial and to cause change, rather than just maintaining the status quo. While people refer to this issue in different ways and with different labels, essentially we wanted to allow an objective, academic researcher the opportunity to test whether police treat people equally as they exercise police discretion and initiate contacts with citizens.³⁵

Chief Closs believed that police services and politicians have tended to shy away from data collection in favour of other strategies that promote bias-free

policing, including training, recruitment, supervision and discipline. He did not deny the need for these programs, but simply believed that they did not go far enough.³⁶

There are numerous potential data collection projects that could assist better policy-making or program development at the OPP. For example, the 2005/2006 Annual Report of the Office of the Correctional Investigator of Canada reported that the rate of incarceration of Aboriginal people in provincial and federal institutions is approximately ten times higher than it is for non-Aboriginal offenders. This may suggest a need for a study of police policies or patterns in laying charges. Many observers have also commented that police are not as responsive to crimes against Aboriginal peoples as they are to crimes against non-Aboriginal peoples.³⁷ This may suggest a need for a data collection study of police response times.

The Correctional Investigator's report illustrates the potential benefit of better data collection. The analysis of Statistics Canada and federal Correctional Service data led to the conclusion that Aboriginal offenders were less likely to be granted temporary absences and parole, they were granted parole later in their sentences, they were more likely to have parole suspended or revoked, and they were more likely to be assigned a higher security level within penal institutions. The Correctional Investigator also compared current and historical data to analyze program effectiveness. The Correctional Investigator then used this data to make detailed recommendations on how to improve the Correctional Services programs for Aboriginal offenders.³⁸

There can be no objection to data collection and evaluation regarding police/Aboriginal relations initiatives on the basis that these studies will involve collecting "race-based" statistics. The Ontario Human Rights Commission has made this clear:

It is a common misperception that the *Code* prohibits the collection and analysis of data identifying people based on race and other *Code* grounds. Many individuals, organizations and institutions mistakenly believe that collecting this data is automatically antithetical to human rights. In fact, the Commission has stated that not only does the *Code* permit the collection and analysis of identity data based on enumerated grounds for *Code* legitimate purposes, appropriate data collection is necessary for effectively monitoring discrimination, identifying and removing systemic barriers, ameliorating historical disadvantage and promoting substantive equality. It is the collection or use of data for improper purposes that further contributes to discrimination or stereotyping that is antithetical to human rights.³⁹

Further, the OHRC emphasized that “in order to fulfill its purpose, data collection should be done in good faith with the purpose of producing accurate, good-quality data rather than attempting to achieve a particular outcome.”⁴⁰

I agree with that view, and I believe that data collection studies should be designed thoughtfully and in cooperation with representatives of the OPP, First Nations organizations, and the Ontario Provincial Police Association. Together, they should be able to identify appropriate data collection priorities and projects.

Experience has demonstrated that data collection projects are more likely to succeed if they are not perceived as designed to isolate or punish individual officers. Any data collection project must be clearly and transparently designed to analyze institutional processes, activities, and outcomes, not individual ones. At the same time, unreasonable or self-serving objections to data collection cannot be allowed to stand in the way of serious efforts to build better police/Aboriginal relations. The challenges to the methodology of this type of study can be answered if the project is undertaken in good faith, with the meaningful participation of interested parties, and with executive and provincial government support.

11.4.2.3 First Nations Participation in OPP Programs

OPP programs could also benefit from more formal participation by First Nations in their development, oversight, and evaluation.

Aboriginal peoples and members of the OPP interact every day, and in every corner of the province. Policies and programs designed to improve police/Aboriginal relations require more than just periodic consultation with First Nations leaders and Aboriginal communities.

Gwen Boniface, former commissioner of the OPP held regular meetings with elected chiefs, the Chiefs of Ontario, and Provincial Territorial Organizations. Senior regional and regional commanders hold meetings with leaders of First Nations and Provincial Territorial Organizations, and detachment commanders are required to meet regularly with local First Nation police services and local elected leaders.

I believe that these consultation forums are an appropriate means of improving communications and dialogue between the OPP and First Nations and Aboriginal peoples across Ontario. Collectively, these efforts represent a very good start. What is needed now is a commitment between the OPP and First Nations to develop a more formal monitoring and implementation program for the OPP programs. The objective would be to develop a transparent, written monitoring and evaluation plan which would assist the OPP and First Nations to design, oversee, and evaluate the strategy and the implementation of programs at the

provincial, regional, and local levels. In effect, the OPP and First Nations must become partners, equally committed to the success of relations between the OPP and Aboriginal peoples.

The formal OPP/Aboriginal peoples advisory committee I recommended in chapter 9 is likely to have the resources, contacts, and credibility needed to build this partnership and strategy effectively.

11.4.3 Accountability and Transparency

The strategies, processes, and structures I recommend would enhance the accountability and transparency of the police/Aboriginal relations programs of the OPP by broadening the base of participation in their design and oversight.

I also believe that important strategies, plans, evaluations, decisions, or reports related to police/Aboriginal relations within the OPP should generally be posted on the OPP website and made available to the public. This will enhance accountability and transparency in the eyes of the wider public, interested organizations, and the provincial government.

11.5 The Provincial Government

The provincial government has two important responsibilities with regard to police/Aboriginal relations. The first is the leadership role of the Ministry of Community Safety and Correctional Services (MCSCS) for the OPP and other police services in Ontario. The second is the direct responsibility of the province to govern and manage the enforcement arm of the Ministry of Natural Resources.

11.5.1 Provincial Leadership in Police/Aboriginal Relations

The *Police Services Act* gives MCSCS the authority to set policy objectives for policing and to establish rules or guidelines to formalize government expectations for the police in specific areas. MCSCS is also directly responsible and accountable to all Ontarians for the success of the OPP and its police/Aboriginal initiatives. (I discuss this further in chapter 9.)

This Inquiry gives the provincial government an important opportunity to work with the OPP and Aboriginal peoples to develop a new and forward-looking provincial strategy to improve police/Aboriginal relations in Ontario. The first part of this strategy should be to consolidate and sustain the gains made by the OPP so far and ensure their effectiveness.

The second part should be to develop province-wide skills, best practices, capacity, and resources to improve police/Aboriginal relations throughout Ontario.

In my view, implementing a provincial police/Aboriginal relations strategy

would be consistent with the best traditions of equitable, transparent, accountable, and democratic policing. Ensuring that Aboriginal peoples participate in decision-making would promote the “honour of the Crown” in government relations with Aboriginal peoples in Ontario. A provincial policy would demonstrate publicly that the provincial government expects Aboriginal peoples in Ontario to be policed equally and with respect. Finally, a provincial policy would support the sustainability, effectiveness, evaluation, transparency, and accountability of the police/Aboriginal initiatives within the OPP and throughout the province.

11.5.2 Provincial Policy Supporting the OPP

The first step in the provincial strategy should be for MCSCS, the OPP, and Aboriginal organizations to develop a provincial policy which supports the OPP in maintaining a comprehensive police/Aboriginal relations strategy.⁴¹ The policy could specify that the OPP should maintain dedicated Aboriginal programs in the area of recruitment, training, and data collection. It could also formally confirm Aboriginal participation in the design, oversight, monitoring and evaluation of these programs. Finally, the policy could set out general principles or expectations regarding accountability and transparency.

This recommendation correlates with my recommendation for a provincial peacekeeping policy. It is designed to ensure that the comprehensive programs initiated by the OPP in this area will be sustained for the long term. It would also publicly affirm that provincial government is committed to and has high expectations of the OPP in this area. Most importantly, this policy would establish the principle that the OPP, the provincial government, and Aboriginal peoples in Ontario share the responsibility for establishing and supporting better police/Aboriginal relations.

The policy should establish general principles and overall objectives. It should not be specific, in that it should be left to the OPP to determine how best to meet those objectives, taking into account its experiences, resources, and priorities.

Clearly, any future provincial government could rescind this policy or reduce funding for it. However, the virtue of a transparent policy is that the government would be publicly accountable for its decision to rescind or alter the policy directive.

Programs need resources, and the provincial government should provide the OPP with the necessary resources to maintain, if not expand, its current police/Aboriginal relations programs. The OPP and the provincial government should negotiate the amount and the conditions, but this funding should be contingent upon agreement by the OPP to undertake appropriate evaluations of its initiatives.

11.5.3 Developing Provincial Strategy, Data, and Resources

The provincial policy with respect to the OPP should be the first part of a wider provincial strategy on police/Aboriginal relations. The OPP strategy and initiatives are important and constructive steps forward, but, as I have noted, they are still quite new and would benefit from the oversight, monitoring, and evaluation program I recommend.

In the second part of this strategy, MCSCS should take the leadership role in developing an Ontario-wide strategy and resources for improving police/Aboriginal relations. It could do this by working with the OPP, Aboriginal organizations, other police services, and perhaps the Ontario Human Rights Commission to identify province-wide issues and objectives and to identify and circulate best practices. Aboriginal participation is just as important to the provincial government as it is to the OPP.

Once again, any provincial policy or program development must be premised on sound, purposeful research, evaluations, and management data. I have already noted the disappointing general lack of research, documentation, or evaluation of police/Aboriginal relations programs or practices. MCSCS, as the lead ministry responsible for policing in Ontario, should address this gap in order to promote better decision-making on police/Aboriginal relations initiatives and bias-free policing generally.

Policing in rural or northern communities is significantly different from policing in a large municipality in southern Ontario. It follows, therefore, that provincial policy and analysis of police/Aboriginal relations would benefit from province-wide research and policing management data.

The need for provincial data collection, and the benefits available from it, far outweighs any practical or political objections. Properly designed research studies and evaluations would provide significant information on interaction between Aboriginal people and the police. They would also help provincial and police policy makers make well-informed decisions about “standard practices or identifying trends that might be counterproductive to police-community relations.”⁴² They would also establish a baseline to judge progress, assist police services and police service boards in identifying best practices, improve public trust between Aboriginal people and police services, and promote transparency and accountability in provincial and police decision-making.

Scott Wortley and Terry Roswell conducted a statistical study on behalf of the African Canadian Legal Clinic which is a good example of a province-wide data collection project. This study, entitled “Police Use of Force in Ontario: An Examination of Data from the Special Investigations Unit” is an important

example of a province-wide policing study, in this case examining the relationship between race and the use of force by police. I commend the Special Investigations Unit (SIU) for their cooperation with this project and hope that they will continue to collect data to provide a better sense of how the police exercise force in this province.

Any provincial strategies, plans, evaluations, decisions, or reports should be transparent and publicly accessible.

11.5.4 A Provincial Guideline

An important component of the provincial strategy should be a provincial guideline for police forces in Ontario.

Difficult relations between Aboriginal peoples and police services in Ontario are by no means confined to the OPP. Indeed, the Inquiry heard of strained relations with police services in several communities, most notably Kenora. It is therefore equally important that police service boards and police services across Ontario take reasonable steps to improve police/Aboriginal relations.

Only the largest municipal police services will have the financial or other resources and capacities to match those of the OPP. It is neither fair nor wise to deny residents and police services in smaller communities the benefits of improved police/Aboriginal relations simply because they are small.

A cost-effective approach might be for the MCSCS to partner with the OPP and other police services to develop generic guidelines that could be adopted by any police service in the province. This approach would be consistent with the MCSCS authority to “develop and promote programs to enhance professional police practices, standards and training” as set out in section (3)(2)(d) of the *Police Services Act* and with the existing policy guidelines in the Police Standards Manual.

As a related measure, the provincial and federal governments should also consider providing appropriate and secure funding to the Law Enforcement and Aboriginal Diversity Network (LEAD). As noted earlier, LEAD is a small but potentially very significant national resource in dealing with these issues. Accordingly, it should be provided resources and other necessary support commensurate with this important mandate.

11.5.5 The Ministry of Natural Resources

Another element of a provincial strategy concerns the Ministry of Natural Resources. There is no doubt that MNR is a law enforcement agency. At present, there are more than 200 conservation officers in Ontario. Their duties include

conducting patrols and inspections and laying charges. In 2004/2005, conservation officers had over 270,000 contacts with members of the public, issued more than 9,000 warnings, laid more than 8,000 charges, and filed almost 200 reports with respect to violations by Aboriginal people.⁴³

As I have noted elsewhere, there is a long history of tension between many Aboriginal peoples and MNR conservation officers. The presentations and submissions to the Inquiry indicated that these tensions continue to this day.

The provincial government submissions emphasized that the province has developed Aboriginal awareness training for MNR staff. It has undertaken recruitment outreach for Aboriginal people, and it has many outreach programs and consultations with members of the Aboriginal community.⁴⁴

Consistency between law enforcement agencies should be encouraged. I therefore recommend that the Ministry of Natural Resources develop and implement a dedicated MNR/Aboriginal relations strategy consistent with my general analysis and recommendations regarding police/Aboriginal relations, including independent evaluation and participation by First Nations in the design and ongoing oversight, monitoring, and evaluation.

11.5.6 Police Discipline and Public Complaints

The final component of a provincial strategy in this area involves police discipline and complaints. In my report on Part 1 of the Inquiry, I concluded that racism and cultural insensitivity created a barrier to a constructive dialogue and may have made a peaceful resolution of the occupation more difficult.

Perhaps the most obvious instance of racism and cultural insensitivity was the comments made by OPP Constable Jim Dyke on September 5, 1995—one day before the shooting. These comments were captured in a videotaped conversation between Constable Dyke and Detective Constable Darryl Whitehead.

The Inquiry heard other conversations between OPP officers recorded in the course of the police operation on September 5/6, 1995. It was clear that Constable Dyke was not alone in his insensitive views, and I was struck by the number of individual officers caught on tape making derogatory remarks about Aboriginal people.

Equally disturbing was the manner in which the OPP dealt with this behaviour. In some instances, they never found out about it. In other cases, senior officials found that it did not amount to “misconduct.” In cases where they did find grounds for misconduct, it was determined that the officers should be disciplined under the “informal” procedures set out in the *Police Services Act*. In no case was any OPP officer disciplined formally. The OPP’s response implies that allegations of racist or culturally insensitive behaviour were not considered serious.

Informal discipline in this context was inappropriate, for two reasons. First, it did not involve a situation where “the conduct appears to be obviously conduct that is not of a serious nature,” which is a criterion required in the *PSA* to justify informal discipline. Second, discipline was carried out behind closed doors, without the transparency and accountability for serious police misconduct envisioned by the *PSA*.

The parties to the Inquiry made a number of suggestions, but the most common was to address the use of informal discipline for incidents involving racist behaviour.

I have followed with interest the work of former Chief Justice of the Superior Court of Justice Patrick LeSage on the reform of the police complaints system in Ontario.⁴⁵ Attorney General Michael Bryant asked Justice LeSage to review the current system and to advise on a model for resolving public complaints against the police in a fair, effective, and transparent way. From my own experience, I am aware that it is an enormous challenge to find the best way to balance the need to give an individual police force an appropriate level of operational independence against the equally important need for effective accountability systems that ensure integrity and sustain public confidence in the police.

Having reviewed Justice LeSage’s report carefully, I think he has done an excellent job in finding the right balance. On April 19, 2006, the Attorney General introduced Bill 103, the *Independent Police Review Act, 2006*.⁴⁶ The legislation implements the key recommendations made by Justice LeSage. The bill appears to have broad support in the Legislature. It received second reading in the fall of 2006 and was considered at committee over the winter recess. Final approval will await the spring legislative session. I urge the provincial government and opposition to give Bill 103 high priority and to ensure that it promptly passes into law. The important improvements to the current oversight model contained in the bill will be a welcome addition to the other accountability systems already in place for policing in Ontario.

A system of informal discipline, when used appropriately, is an effective tool in managing police operations. The issue is not whether an informal discipline process should exist, but rather when it is appropriate to use it. Justice LeSage acknowledged this in his report. Bill 103 includes informal discipline as an option in certain specific contexts, but it also sets out clear criteria for when and how it should be applied.

In my view, the informal discipline system set out in Bill 103 strikes the appropriate balance of transparency, accountability, and confidentiality in handling complaints against individual police officers. And, importantly, it will ensure that complaints involving racism or other culturally insensitive conduct are dealt with properly.

It is important to note that Bill 103 retains the right of members of the public to complain to an individual police force about the conduct of any of its police officers, up to and including the chief. However, the legislation also establishes an important alternative way to lodge complaints, namely to a newly created Independent Police Review Director.

In addition to an extensive oversight role, the director will receive complaints directly from members of the public. Upon receipt of a complaint, the director will be obliged to undertake an initial review and decide how the complaint should be handled. One option will be to retain the complaint and conduct an investigation. Another option will be to refer the complaint to the chief of the police force that employs the officer who is the subject of the complaint, or to the chief of another police force. In that case, the director will have the important power to direct the chief regarding how to deal with the specific complaint.

Bill 103 also provides an enhanced role for individual complainants. Once an investigation has been completed, by either the director or a chief, the complainant must be provided with a copy of the investigation report. If the director or chief decides that the complaint should be dealt with in the informal discipline stream because the misconduct “was not of a serious nature,” then the complainant must be advised of this decision and asked to consent. Without the consent of the complainant, informal discipline will not be available as an option, and the complaint must be dealt with in a formal hearing open to the public.

The complainant will have a further option in circumstances where a chief has decided that a complaint should be dealt with informally. The complainant will be able to ask that the director review the complaint and decide whether informal discipline is appropriate in the circumstances. At that point, the director may also decide to take over carriage of the complaint.

At various stages of the complaint investigation process, the director will have specific powers and authority to control the extent to which informal discipline is applied. For example, if the director were to decide, as a matter of policy, that complaints involving allegations of racism or cultural insensitivity should appropriately stay with his or her office for investigation, and not be referred to a chief, that option is available in Bill 103. The director could also decide, on a policy level, that all complaints involving racism or cultural insensitivity, which a chief has decided to deal with informally, must be transferred back to the director for investigation if the complainant requests it. The director could also deal with the issue of racism on a case-specific basis, exercising the power to direct a chief to handle a particular complaint through the formal disciplinary process.

The director has one other power worth mentioning. In addition to his or her other responsibilities, the director

may examine and review issues of a systemic nature that are the subject of, or that give rise to, complaints made by members of the public ... and may make recommendations respecting such issues to the Solicitor General, the Attorney General, chiefs of police, boards, or any other person or body.⁴⁷

Accordingly, if the director determines that racism or any other form of cultural insensitivity appears to reflect a systemic problem, either generally or within a particular police force, he or she will have the power and authority to conduct an examination and review, using the full range of investigatory powers available under the legislation.

In my view, the combination of an enhanced role for complainants and the broad powers of the new Independent Police Review Director will create a much more appropriate scheme of informal discipline for circumstances where misconduct is “not of a serious nature.” It will continue to allow for complaints involving minor misconduct to be dealt with informally, on consent, while retaining the formal, open, and transparent disciplinary process for situations where, in the opinion of either the complainant or the director, informal discipline is not appropriate.

There are two other related issues under the rubric of this new legislation, which provincial government should address in order to provide a truly effective new police complaints and discipline system.

As we saw during the Inquiry, racist behaviour and other culturally insensitive conduct amongst police officers is seldom revealed publicly. Constable Dyke made racist comments in a location where only police officers were permitted, and the insensitive comments heard on the communications tapes reflected conversations among individual police officers and civilian personnel which would not have been made public if this Inquiry had not been called.

It is important that all racist conduct by police officers be brought to the attention of senior officials within the police service so that the comprehensive complaint investigation and disciplinary processes included in Bill 103 can be applied. In my view, individual police officers should be compelled to report any racist or culturally insensitive language or behaviour by fellow officers to their supervisors in the chain of command. And individual police services, including the OPP, should have processes in place to ensure that this reporting obligation is properly discharged.

It was not a member of the public who made the complaint concerning the conduct of Constable Dyke and Detective Constable Whitehead. According to the testimony of former OPP Commissioner Gwen Boniface, she initiated this complaint herself when a request under the *Freedom of Information and Protection*

of *Privacy Act* drew the tape containing the racist conversation between the two officers to her attention.

In circumstances involving internal complaints, the new consent provisions in Bill 103 regarding informal discipline may not be adequate. If the complaint against Constable Dyke and Detective Constable Whitehead had been made under the Bill 103 scheme, Commissioner Boniface would have been in a conflict of interest because she was both the complainant and the senior official responsible for determining the appropriate disciplinary process. Clearly, it would be inappropriate to have required that she ask for her own consent to her decision to deal with the complaint informally. The most appropriate way to deal with this under the Bill 103 disciplinary model is to require that the director handle all internal complaints, including complaints involving racism and other culturally insensitive behaviour.

Recommendations

63. The OPP should maintain its Native Awareness Training and related police/Aboriginal relations initiatives as a high priority and devote a commensurate level of resources and executive support to them.
64. The OPP should develop active, ongoing monitoring strategies for its police/Aboriginal relations strategy and programs, including:
 - a. commissioning an independent, third-party evaluation of its Native Awareness Training and recruitment initiatives;
 - b. commissioning data collection studies to evaluate police decision-making and operations. These studies should be designed in partnership with First Nation organizations and the Ontario Provincial Police Association, if possible; and
 - c. working with First Nations organizations to develop a more formal monitoring and implementation program for the OPP police/Aboriginal programs.
65. The provincial government should develop a provincial police/Aboriginal relations strategy. This strategy should publicly confirm the commitment by the province to improving police/Aboriginal relations in Ontario. Elements of this strategy should include the following:
 - a. The Ministry of Community Safety and Correctional Services should

work with the OPP and Aboriginal organizations to develop a provincial policy supporting the OPP police/Aboriginal relations programs.

- b. The Ministry of Community Safety and Correctional Services should work with the OPP, Aboriginal organizations, other police services, and the Ontario Human Rights Commission to identify and circulate best practices in police/Aboriginal relations.
 - c. The Ministry of Community Safety and Correctional Services should develop a provincial research and data collection strategy to promote improved police/Aboriginal relations policy and programs and bias-free policing across Ontario.
 - d. The Ministry of Community Safety and Correctional Services should issue a guideline for police forces in Ontario promoting best practices in police/Aboriginal relations.
 - e. The Ministry of Natural Resources should develop and implement a dedicated MNR/Aboriginal relations strategy, consistent with the analysis and recommendations in this report.
66. The provincial government should commit sufficient resources to the OPP to support its police/Aboriginal relations initiatives. This funding should be dependent upon agreement by the OPP to commission and publish independent evaluations of its Native Awareness Training and recruitment initiatives.
 67. Bill 103, the *Independent Police Review Act, 2006*, should be reviewed to ensure that internally generated complaints related to a police service are handled by the Independent Police Review Director, including complaints relating to racism and other culturally insensitive behaviour.
 68. The Independent Police Review Director should determine the most appropriate policy to be followed by his or her office and police services in Ontario in handling complaints of misconduct involving racism and other culturally insensitive conduct, including the role, if any, for informal discipline. The Independent Police Review Director should consult with community and Aboriginal organizations when developing this policy.
 69. The Ministry of Community Safety and Correctional Services should issue a directive to all police services in Ontario, including the OPP, requiring

police officers to report incidents of racism or other culturally insensitive behaviour by other officers to their supervisors.

70. The OPP should establish an internal process to ensure that racist and other culturally insensitive behaviour by police officers is dealt with publicly. The OPP should also determine the most appropriate policy for handling complaints of misconduct involving racism and other culturally insensitive conduct, including the role, if any, for informal discipline.

Endnotes

- 1 OPP Part 2 submission, para. 124.
- 2 Bill 103, Independent Police Review Act 2006 (to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act). 38th Parliament. 2nd Session, <http://www.ontla.on.ca/documents/Bills/38_Parliament/session2/index.htm#P998_68238> [Bill 103].
- 3 Ovide Mercredi testimony, April 1, 2005, Transcript pp. 97-8.
- 4 Robert Runciman testimony, January 11, 2006, Transcript pp. 158-61.
- 5 Canadian Association of Chiefs of Police, "Resolutions," 2004, Resolution #02/2004, <<http://www.cacp.ca/english>>. The resolution reads, in part: "THEREFORE BE IT RESOLVED THAT the Canadian Association of Chiefs of Police is committed to the preservation of democratic freedoms, human rights and individual dignity, and; ... BE IT FURTHER RESOLVED THAT the Canadian Association of Chiefs of Police will exercise leadership by initiating or strengthening programs and strategies that promote bias-free policing, giving particular attention to public accountability, policy-making, management, supervision, equitable human resource practices, education, community outreach and partnerships."
- 6 Royal Canadian Mounted Police, Operational Manual, 2006, Part 38.2 Bias-Free Policing (on file with the Inquiry).
- 7 Law Enforcement Aboriginal and Diversity Network (LEAD) was developed to achieve a common professional approach to relationships with Aboriginal and diverse communities by all Canadian law enforcement agencies. See LEAD, <<http://www.lead-alda.ca/index.php>>.
- 8 See generally Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System;" John Borrows, "Crown and Aboriginal Occupations of Land: A History & Comparison;" and Jean Teillet, "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario" (Inquiry research papers). See also The Chippewas of Nawash Unceded First Nation, "Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted their Rights and Claims and Dealt with the Backlash," and The Union of Ontario Indians, (i) "Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario" and (ii) "Anishinabek First Nations Relations with Police and Enforcement Agencies" (Inquiry projects). See also the Youth and Elder Forum about Police/Aboriginal Relations, April 22, 2005 and the Chiefs of Ontario special assembly, March, 2006 (Inquiry events), where several commentators also raised these issues. They were also discussed at the Law Enforcement Aboriginal Diversity Network (LEAD) conference in Toronto, April 20-May 3, 2006 (see LEAD, <<http://www.lead-alda.ca>>).
- 9 (i) Nova Scotia. Royal Commission on the Donald Marshall, Jr. Prosecution, *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: 1989); (ii) Manitoba. Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); (iii) British Columbia. Cariboo-Chilcotin Justice Inquiry, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria: 1993); (iv) Alberta. *Policing in Relation to the Blood Tribe: Report of a Public Inquiry* (Edmonton: February 1991); (v) Ontario. Ministry of the Attorney General, *Report of the Osnaburgh-Windigo Tribal Council Review Committee* (Toronto: 1990); (vi) Canada. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Royal Commission on Aboriginal Peoples, 1996); (vii) Saskatchewan. Commission of Inquiry into the Shooting Death of Leo Lachance, *Report of Commission of Inquiry into the Shooting Death of Leo Lachance* (Regina: 1993); (viii) Saskatchewan. Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, *Legacy of Hope: An Agenda for Change* (Saskatoon: 2004); (ix) Saskatchewan. Commission of Inquiry into Matters Relating to the Death of Neil Stonechild, *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina: Queen's Printer, 2004).
- 10 John Hylton, "Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples" (Inquiry research paper), p. 6. See also Human Sector Resources, "Challenge, Choice and Change: A Report on Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples" (Inquiry research paper).

- 11 Human Sector Resources, p. 4.
- 12 Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform report (see note 9 (viii)), pp. 5-6.
- 13 *R. v. Williams* [1998] 1 S.C.R. 1128; and *R. v. Gladue*, [1999] 1 S.C.R. 688.
- 14 Chiefs of Ontario Part 2 submission, pp. 63-4, paras. 130-3.
- 15 The Union of Ontario Indians, “Anishinabek First Nations Relations with Police and Enforcement Agencies” (Inquiry project), pp. 19-20.
- 16 Chippewas of Kettle and Stony Point First Nation submission, p. 77.
- 17 Youth and Elder Forum about Aboriginal and Police Relations, April 22, 2005 (Inquiry event).
- 18 See summary in OPP, “Aboriginal Initiatives: Building Respectful Relationships” (Inquiry project).
- 19 OPP Part 2 submission, p. 46, para 103.
- 20 Police Orders specifically addressing these issues include orders related to discrimination, harassment, illegal profiling, and accountability of employees and manager/supervisors. (Police Orders, 6.10.3 and 6.10.4, on file with the Inquiry.)
- 21 OPP slide presentation, “2005-2007 Mission Critical Issues: Key Messages and Priorities, 2006 Executive Business Planning Workshop, June 14-16, 2005” (on file with the Inquiry).
- 22 OPP Part 2 submission, p. 53, para. 117.
- 23 *Ibid.*, pp. 52-3, para. 115. The OPP interview process now includes psychological testing and questions designed to identify prejudices and biases. In addition, reference checks specifically focus on acceptance of members of diverse communities and whether the individual has used racial slurs or has exhibited negative attitudes.
- 24 *Ibid.*, p. 54, para. 117. OPP Bound and OPP Northern Experience encourage Aboriginal people to consider the OPP as a career. p. 56: Aboriginal candidates who are unsuccessful in their application are, when appropriate, mentored by a current OPP officer to improve their chances of being accepted when they reapply.
- 25 *Ibid.*, p. 54, para. 117. In order to encourage Aboriginal officers to remain with the OPP once recruited, the force offers Aboriginal Inreach Initiatives to ensure recruitment of Aboriginal officers to specialized units. In addition, at the annual Aboriginal Officers Leadership Forum, Aboriginal members share experiences and make recommendations to the commissioner.
- 26 *Ibid.*, p. 61, para. 123.
- 27 *Ibid.*, p. 53, para. 117.
- 28 *Ibid.*, p. 67, para. 131.
- 29 *Ibid.*, p. 67, para. 132.
- 30 *Ibid.*, p. 71, para. 141.
- 31 *Ibid.*, pp. 52-65. The OPP had a similar view of these challenges. According to the OPP, the breadth and depth of commitment to these initiatives by individual members of the OPP will prevent regression, its policies and programs are mutually reinforcing, its consultation and outreach efforts have created an external constituency that will continue to support these programs, and the province should support these programs financially.
- 32 Ontario. Ontario Human Rights Commission, “Policy and Guidelines on Racism and Racial Discrimination” (2005), <<http://www.ohrc.on.ca/english/publications/racism-and-racial-discrimination-policy.shtml>> (accessed Feb. 19, 2007).

- 33 OPP Part 2 submission, pp. 65-8, para. 128.
- 34 William Closs and Paul McKenna, "Profiling a problem in Canadian police leadership: the Kingston Police data collection project," *Canadian Public Administration: The Journal of the Institute of Public Administration of Canada*, Summer, 2006, vol. 49, number 2, p.145.
- 35 William Closs, The Kingston Police Data Collection Project, Preliminary Report to the Kingston Police Services Board, "Bias Free Policing - Police Powers/Rights and Freedoms, a Critical Balance," May 17, 2005, p.1, <<http://www.police.kingston.on.ca/Bias%20Free%20Policing.pdf>> (accessed February 19, 2007).
- 36 Closs and McKenna, p. 157.
- 37 Rudin, pp. 37-41.
- 38 Canada. The Correctional Investigator Canada, "The Annual Report of the Office of the Correctional Investigator of Canada, 2005-2006" (Sept 2006), Aboriginal Offenders, <http://www.ocibec.gc.ca/reports/AR200506_e.asp#AboriginalOffenders>.
- 39 Ontario Human Rights Commission, "Part III - Guidelines for Implementation: Monitoring and Combatting Racism and Racial Discrimination," 6. Collection and Analysis of Numerical Data, <http://www.ohrc.on.ca/english/publications/racism-and-racial-discrimination-policy_6.shtml> (accessed February 19, 2007).
- 40 Ibid., 6.1.2, Data Collection and Analysis Methodology.
- 41 The provincial initiatives and programs I recommend in this chapter should not be the responsibility of the Ministry of Aboriginal Affairs discussed in chapter 8. These are policing responsibilities, which should remain with the Ministry of Community Safety and Correctional Services.
- 42 Closs, p. 2.
- 43 Province of Ontario, Ministry of Natural Resources, "Questions Regarding the Ministry of Natural Resources" (Inquiry project), p. 3
- 44 Province of Ontario Part 2 submission, pp. 13-17, paras. 20-29.
- 45 Ontario. Ministry of the Attorney General. The Honourable Patrick J. Lesage, "Report on the Police Complaints System in Ontario" (April 22, 2005), <<http://www.ontla.on.ca/library/repository/mon/10000/252151.pdf>> (accessed February 19, 2007).
- 46 Bill 103.
- 47 Ibid., s. 57.

POLICE/GOVERNMENT RELATIONS

This chapter examines the legal, policy, and institutional arrangements with respect to government involvement in policing policy and operations. I focus in particular on the institutional understandings, structures, and processes that should apply both in advance of and during critical events, including the policing of Aboriginal protests and occupations.

Police/government relations have had a high profile in the public debate about Ipperwash. A large portion of the Part 1 evidentiary hearings were devoted to considering allegations of political interference in the events that led to the death of Dudley George. Volume 1 of this report therefore addresses the relationship between the OPP and the then-provincial government in some detail. Indeed, the hearings and evidentiary record provide an unprecedented case study of police/government relations in practice.

Police/government relations have also had a high profile in the policy phase of the Inquiry. Our first Part 2 event was a full-day symposium on this issue, organized in partnership with Osgoode Hall Law School. This symposium brought together academics, police and government officials, Aboriginal leaders, and virtually every party with standing in the Inquiry, to learn about and discuss this important topic. The University of Toronto Press is to publish a compilation of the symposium research papers in early 2007.¹ These papers are also available on our website.

Unlike many other topics considered in this report, there has been comparatively little advancement or reform in the legal and policy rules governing this fundamental constitutional relationship in the last twelve years. This is surprising given the significant and constructive progress on many other Ipperwash-related issues during this period, particularly in the areas of policing Aboriginal occupations and protests and police/Aboriginal relations.

The lack of progress or reform in police/government relations is unfortunate, because it means that the confusion and deficiencies so apparent in police/government relations at Ipperwash largely continue to this day.

It is no doubt true that government and police policy-makers have learned many lessons from Ipperwash. I suspect, for example, that police and government policy-makers involved at Caledonia are more acutely aware of the importance of both the perception and fact of political interference in police operational decision-making because of their collective desire to avoid another Ipperwash.

Nevertheless, the legislative debates and public information about the Caledonia occupation reveal that several important issues remain outstanding.

The accumulated wisdom and continuous learning of individual decision-makers cannot be underestimated. It is also not enough. Lessons can be forgotten and people inevitably move on. In the end, lessons and reforms must be institutionalized. The comparative lack of progress in this area stands in stark contrast to the lessons the OPP has learned about how to police Aboriginal occupations and protests. This is an area where lessons have been written down and new policies have been adopted, publicized, and trained upon.

Absent constructive reforms, allegations of political impropriety and partisan policing will very likely remain a frequent feature of politics in Ontario and Canada. For example, in the legislative debates over the policing of the Caledonia occupation, there have been allegations of both improper political interference and of government shirking.

The facts at Ipperwash and the policy research conducted in the Inquiry have led me to conclude that the concept or doctrine of police independence needs to be reconsidered in light of our evolving understanding of how police and governments can and should work together in a modern democracy. The increasing complexity of policing (and government, for that matter) means that the apparently simple and understandable dichotomies between police/government and policy/operations are no longer, by themselves, sufficient to guide policy-makers and decision-making on both sides of the issue. In my view, police and government decision-making will always intersect and policy and operations will always be fluid concepts, subject to reasonable interpretation and reinterpretation depending on the context. This is particularly true in the case of Aboriginal occupations and protests, where lines between policy and operations are often blurred.

Both police and government will benefit from clearer rules on police/government relations. Failing to address these issues will very likely mean that these issues will be addressed in yet another inquiry to consider police/government relations in the aftermath of a crisis or serious allegation of impropriety. This is an inefficient and unnecessary way to establish public policy. The police/government relationship cannot and should not be reduced to forensic examinations of public controversies.

I believe that it is possible and desirable to adopt reforms that will significantly reduce the perception and fact of inappropriate government interference. Yet this is just one of several reasons which justify making clearer rules for the police/government relationship. Clearer rules will also significantly promote accountability, transparency, and public confidence in key democratic institutions and leaders. Finally, clearer rules may also increase public safety and improve

police and government decision-making during potentially volatile public order incidents.

Care must be taken to ensure transparency and clarity in these matters so that police and governments can both be called to account for difficult and controversial decisions, irrespective of how we strike the balance between police and government. When something goes wrong, as it tragically did at Ipperwash, the public has a right to know who made the key decisions and why. In an ideal world, proceedings such as this Inquiry would not be necessary.

Subject to specified exceptions, Ontarians should expect that they have the same right to know about police/government issues as they have in any other area of important public policy. Police/government relations raise important public policy issues whether there is a public controversy or not. Clarity, transparency, and accountability are important at all times, not just during a crisis.

A close examination of the issues and practical exigencies of policing Aboriginal occupations reveals the fundamental importance of this issue to public safety, public accountability, and the peaceful resolution of occupations and protests. Aboriginal occupations and protests provide both police and government with a dynamic, tense, and challenging environment in which they must make many important decisions that may have a profound effect on the personal safety of police officers and protesters alike. These decisions may also have a profound effect on future relations with Aboriginal people. Thus, the issue of police/government relations has a vital connection to my mandate to make “recommendations directed to the avoidance of violence in similar circumstances.”

12.1 The Importance of Police/Government Relations

12.1.1 The Delicate Balance

The police/government relationship establishes limits and expectations for government involvement in policing policy and operations. The relationship is important because fundamental democratic principles and values are at stake.

The police provide some of the most basic functions in any state. The police have law enforcement powers that distinguish them from other public servants. They also have special skills and knowledge that quite rightly give them considerable discretion and autonomy in their work. As a result, Canadian democracy depends upon the ability of the police to fulfill their responsibilities to keep the peace and enforce the law equally, fairly, and without partisan or inappropriate political influence.

At the same time, the police must be responsible and accountable to the public through elected representatives. Governments, legislatures, and the public all

have a legitimate interest in the policies and performance of the police. Subject to some important exceptions, all Ontarians have a general right to know what the police are doing and why. This is especially true for the policing of Aboriginal protests and occupations.

Experience in Canada and elsewhere has proven that it is not always easy to reconcile competing principles of “police independence” with appropriate government intervention in police decision-making and activities. The Ipperwash Inquiry is the fifth major Canadian public inquiry in the last twenty-five years to address police/government relations in detail.² This issue has also been discussed at length in the United Kingdom, New Zealand, and Australia.³

The relationship between police and government is a delicate balance. Many things can go wrong if the balance is upset or tipped too far in one direction.

On the one hand, the police will have too much “independence” if they are not subject to legitimate direction from democratically elected authorities. Nor should the police be “independent” of requirements to explain and justify their actions. Tipping the balance too far in favour of police independence, therefore, could result in the police effectively becoming a law unto themselves.

On the other hand, the balance can be tipped too far in favour of government intervention or authority. Governments should not be allowed to influence specific law enforcement decisions or specific operational decisions of the police. These decisions are legitimately within the scope of police expertise and discretion. Government intervention in these areas risks both the appearance and reality of partisan or inappropriate political influences affecting the administration of justice and the rule of law. Sometimes, even a reasonable appearance of government influence can damage public confidence in the impartial and non-partisan administration of justice. Inappropriate government intervention can also jeopardize public safety if it is ill-considered or badly informed.

In short, it is equally dangerous for governments to become either too involved in policing or not involved enough. Yet the police/government debate is not simply about preventing police from becoming a law unto themselves or inappropriate government influence. It is also about ensuring public accountability and transparency for police and government decision-making.

12.1.2 The Special Case of Public Order Policing and Policing Aboriginal Occupations and Protests

It is not surprising that the police/government relationship was the subject of considerable controversy in the public debate about Ipperwash. Police/ government relations controversies often arise in the context of public order events in Canada and

internationally. This Inquiry is one example. The APEC Inquiry is another. That inquiry was called in part because of allegations of improper interference by members of the Prime Minister's staff in the policing of the APEC summit in Vancouver.

The persistence or frequency of police/government controversies during public order events does not mean that governments should be prohibited from getting involved in the policing of them. On the contrary, limited government intervention in public order events and Aboriginal occupations and protests is not just appropriate, but sometimes necessary. It is nevertheless helpful to understand why or how governments may become involved in order to better understand government interests and priorities during these situations.

Public demonstrations and other public order events may invite government involvement in police decision-making for a number of reasons. Demonstrations are often part and parcel of significant public controversies. Governments may also want to become involved because the demonstration could affect issues such as foreign relations or access to government services. Demonstrations and other public order events may also invite government involvement because they have significant consequences for non-protesting communities and/or third parties in close proximity to the event. Finally, governments may become involved because they believe that the demonstration puts public welfare or public order at risk.

Aboriginal occupations and protests often raise novel and complex questions even beyond those normally applicable to public order policing. Aboriginal protests, occupations, and blockades are a crucial category of public order events which often stand alone in their complexity, particularly where a colour of right, treaty right, or other Aboriginal right is alleged.⁴

Aboriginal occupations and protests are also distinct from a police/government relations perspective. Unlike a labour protest, governments are almost invariably the target or object of major Aboriginal occupations and protests.⁵ The research papers prepared for the Inquiry point to the roots of Aboriginal protests, particularly those over land and resources, in treaty and Aboriginal rights. Moreover, Aboriginal occupations and protests frequently occur off reserve on Aboriginal traditional lands owned by the federal or provincial Crown. These two factors alone give the provincial and federal government significant influence on the progress, duration, and potential outcome of an Aboriginal occupation or protest. An occupation on Crown land means, for example, that the federal or provincial government will itself decide whether and how to seek an injunction.

Aboriginal occupations and protests are also distinguished by the multiplicity of government agencies or ministries involved in them. The legitimate involvement of multiple actors, however, strains many aspects of police/government relations, particularly the concept of ministerial accountability for the police.

Finally, governments are also involved because major Aboriginal occupations and protests are generally policed by the provincial or national police services.

12.1.3 Why We Must Act

In this chapter, I recommend the basic elements of a new framework for police/government relations. I consider the principles and practical issues involved as well as the institutional structures or processes which, in my view, are best able to achieve this substantive objective.

In my view, these measures are needed to address the ongoing confusion and lack of clarity about the appropriate relationship between police and government. As noted above, I believe that the current situation encourages controversies and allegations of impropriety, increases the risk of inappropriate government influence in policing, makes it easier for governments to shirk their responsibilities, and potentially risks public safety and increases the potential for violence.

I stress the salutary benefits of transparent decision-making and public accountability because I believe that internal police or government policies are simply not enough. Public information, policies, procedures, and records of decision-making are needed as well. Publicly transparent and accessible information promotes not only democratic accountability, but also better decision-making. For example, transparent structures and procedures will promote freer and more constructive exchanges of information between police and government because they will reduce the perception or risk of allegations of political interference.

Transparent structures and processes allow the public to be better informed about government and police decision-making. Transparency also allows the public to hold both police and government accountable for their decisions. For that matter, transparency is also likely to have a positive effect on police and government decision-making. In sum, improved transparency should promote public confidence in impartial and sound law enforcement and government responsibility for the policies pursued by the police.

Some may not think that structural or systemic reforms are necessary. Many people likely believe that the most important safeguard in the police/government relationship is the personal integrity and professionalism of the individuals involved. They may also be skeptical about complex or costly institutional reforms which purport to clarify the real world of police/government relations. Or, they may simply believe that practical experience has demonstrated that the existing system works well for the most part. These are important objections, particularly when voiced by experienced observers.

The importance of integrity and leadership in police/government relations

cannot be underestimated. No process or institutional structure will work if the individuals making decisions within those institutions are unwilling to act ethically. Police/government relations will inevitably fail if police leaders cannot stand firm in the face of real or apparent political pressure. Police/government relations will also fail if government officials choose to shirk responsibility for hard or politically unpopular decisions. Personal integrity and leadership are absolutely essential to police/government relations.

Nevertheless, the integrity argument is essentially a response to only one of the concerns about police/government relations: partisan decision-making. Partisan decision-making is arguably the greatest risk of inappropriate government influence, but it is not the only one. I believe that successful police/government relations cannot rely exclusively on the personal character or qualities of key decision-makers. Personal integrity does not, for example, necessarily promote or guarantee public accountability. Nor does one person's integrity guarantee that the next person will act in the same way. Public accountability and the consistency of decision-making depend upon public policies, procedures, and records.

12.2 Learning from Ipperwash

As noted in the introduction to this chapter, police/government relations have had a high profile in the public debate about Ipperwash and at the Inquiry itself. The controversy surrounding Ipperwash included allegations of political interference in policing by the highest elected officials in the province.

My report on Part 1 of the Inquiry addresses police/government relations in considerable detail. The evidentiary hearings focused on several important issues of fact, including the following:

- The nature and substance of the relationship between police and government
- Whether or how directions and advice were given by political leaders and their staff members to the police
- The role and activities of various ministers, officials, and ministries
- How information was exchanged between government and police officials
- Whether the fact or appearance of improper political interference was present in police operations

Ipperwash is a cautionary tale about the difficulties of police/government

relations in practice. It is also a sobering case study, involving many of the themes and issues discussed in this chapter. I will not repeat the details of my findings in Part 1 here, but I will comment on the lessons and themes emerging from those findings.

The first lesson that emerges from Ipperwash is the need for a clear statutory and written policy framework to govern police/government relations. Most if not all of the politicians and governmental officials who testified in Part 1 had a general sense of the need for the police operations to be independent of government policy-making. However, many of the same witnesses admitted that there were many grey areas in their understanding and interpretation of police independence. It was also clear from the evidentiary hearings that most witnesses' understanding of police/government relations was based on unwritten rules or a kind of conventional wisdom. The decision-makers and participants did not have the benefit of clear principles, policies, or procedures to guide them.

The lack of agreement about basic principles in police/government relations and police independence is confirmed by the fact that while many parties in Part 1 alluded to the idea of "police independence" from government in their questions and submissions, there was often disagreement about what this meant.

The second lesson that emerges from Part 1 is the lack of transparency in and accountability for government decision-making. Much time at the evidentiary hearings was devoted to discovering what happened at several government meetings, including the "dining room meeting" on September 6, 1995. This was the meeting at which the Premier, several Cabinet ministers and deputy ministers, and other officials discussed the provincial government response to the occupation at Ipperwash Provincial Park. Witnesses at the Inquiry presented different and sometimes irreconcilable views about what decisions were made at these meetings, who said what, and how the government position was described. A reasonable person would be hard pressed to conclude that many of the important decisions about Ipperwash were either transparent or accountable. The controversy and uncertainty that surrounded the "dining room meeting" underlines the importance of reducing to writing, whenever possible, government dealings with the police.

A third lesson relates to the difficulty of maintaining a distinction between government "directions" and "guidance" in practice. In Part 1, I concluded that the OPP was not given improper directions by the Premier, other ministers, or political staff. However, I also concluded that the Premier and other political officials made their displeasure about the occupation and the performance of the police well known. While these actions did not constitute inappropriate government interference in police operations, they had the effect of putting

unnecessary pressure on the police and led to a perception of inappropriate interference. In certain circumstances, this perception may undermine confidence in non-partisan, fair, and professional policing.

A fourth general lesson that emerges from Ipperwash is the need to respect proper chains of command and divisions of responsibility. This is necessary to ensure accountability, to ensure accurate and appropriate exchanges of information, and to avoid the risks and perceptions of improper government direction of police operations. An important example was the overlapping and sometimes contradictory information provided to the government by the OPP and officials from the Ministry of Natural Resources (MNR), including provocative reports from MNR officials about gunfire in the park. MNR officials did not have the expertise or information necessary to assess the reliability or accuracy of these reports. This example and other examples underscore the importance of filtering and exchanging information through appropriate channels. MNR and other ministries have a legitimate role to play in resolving Aboriginal occupations and protests. However, their contributions should respect the limits of their expertise and authority. Blurring of responsibilities and lines of authority can lead to crossed signals, mixed messages, and inaccurate and contradictory information passing between government and the police.

A final lesson emerging from the evidence concerns the challenges to our traditional and legal understandings of ministerial responsibility presented by modern, centralized government structures. Ipperwash demonstrates the need for a clearer understanding of the respective roles and responsibilities of the many parts of governments that may have a legitimate role in resolving Aboriginal occupations and protests. The Interministerial Committee struck to address the Ipperwash occupation had representatives from several ministries. This is appropriate, and indeed, I suggest in Chapter 9 that involvement by the federal government is also often appropriate. Nevertheless, this holistic and centralized approach to public order policing strains the principle that the Solicitor General (or Minister of Community Safety and Correctional Services, as the office is now called) is the minister responsible for the OPP. Ministerial responsibility is not a legal technicality. It is crucial in ensuring democratic accountability for police actions.

The communication of information from the police to the government should be routed, whenever possible, through the proper channels at the Solicitor General's department and through the full chain of command in the OPP, including the commissioner or his designate. Proceeding through proper channels is necessary to ensure transparency and accountability and to protect against the risk or perception of improper government interference with police operations.

In the pages that follow, I attempt to clarify the proper ambit of police inde-

pendence, and even more importantly, to outline transparent and workable reforms and procedures that can be used to resolve continuing disputes and uncertainties about the proper conduct of police/government relations. I am confident that had these reforms and procedures been in place in 1995, we would have had a much clearer understanding of the relationship between the provincial government and the OPP at Ipperwash.

12.3 What is “Police Independence”?

One of the most difficult issues in police/government relations is the question of the scope of police independence from government. Statements are sometimes made that police are “independent from government” or “not subject to direction” from government. Statements at this level of generality are bound to be misleading, no matter how well intentioned.

It is worth noting at the outset that the doctrine of police independence is unique to certain common law jurisdictions, including England, Canada, Australia, and New Zealand. It is not recognized as a legal principle in the United States or Scotland.⁶

In this section, I briefly review and discuss the unsettled and sometimes contradictory history of the concept of police “independence.”

Professor Kent Roach observed that one can find support in the cases and statutes for several different models of police independence, ranging from virtually unfettered police independence to seemingly unlimited statutory powers of ministerial direction of the police.⁷

12.3.1 *The Blackburn Doctrine*

The starting point for contemporary discussions of police independence is the 1968 decision by Lord Denning in the case of *R. v. Metropolitan Police ex parte Blackburn*.

The *Blackburn* case is the genesis of the common law or judge-made doctrine of police independence. The decision is important because it sets out a very expansive view of police independence, which has cast a long shadow over Anglo-Canadian debates about police/government relations ever since.

The case involved an attempt by a Mr. Blackburn to challenge a confidential instruction by the commissioner of the London police to his officers to not enforce certain gambling laws. In the course of his decision, Lord Denning held:

I have no hesitation in holding that, like every constable in the land, [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act, 1964, the Secretary of State can call

upon him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.⁸

Lord Denning supported these broad propositions by citing two cases which held that there was no master and servant relationship between the Crown and the police for the purpose of determining civil liability. The cases were not concerned with general constitutional principles—or even with police independence—but rather with the limited proposition that “there is no master and servant relationship between constables and their employers in the rather special sense that has been given that phrase in the law of torts.”⁹

The *Blackburn* decision, and the idea that governments have no right to intervene in a broad range of police matters, has been very influential in Canadian and British law and policy.¹⁰ The broad theory of police independence established by the *Blackburn* doctrine (as it is sometimes called) continues to resonate in legal and political debates today.

12.3.2 Campbell and Shirose

The Supreme Court of Canada decision in *Campbell and Shirose* in 1999 is the most extended discussion of the principle of police independence by the court.

The case is important to us because it revived and in some ways advanced the *Blackburn* doctrine, notwithstanding the clear wording of s. 5(1) of the *RCMP Act*, which describes the relationship between the RCMP commissioner and the minister:

5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith.¹¹

Campbell and Shirose were charged with drug offences as a result of a reverse sting operation in which RCMP officers sold them drugs. The Crown sought to defend the police conduct on the basis that the police were part of the Crown or agents of the Crown and protected by the public interest immunity of the Crown.

Justice Binnie for the unanimous Supreme Court emphatically rejected this argument:

The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes.¹²

The Court noted that the police “perform a myriad of functions apart from the investigation of crimes” and that “[s]ome of these functions bring the RCMP into a closer relationship to the Crown than others.” Nevertheless, the Court stressed that “in this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard the police are independent of the control of the executive government.”¹³ The Court declared that this principle “underpins the rule of law,” which, it noted, “is one of the ‘fundamental and organizing principles of the Constitution’.”¹⁴

Justice Binnie further explained:

While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience.¹⁵

Campbell and Shirose has unquestionably renewed the doctrine of police independence, even though it defines police independence more narrowly than *Blackburn* does. Just as clearly, *Campbell and Shirose* does not discuss or establish the boundaries of police independence beyond the core of law enforcement.¹⁶

Campbell and Shirose is important to police/government relations because it confirms that police officers enjoy independence from government, in that the police should not be directed by the minister either to commence or to stop a criminal investigation. The case also demonstrates a judicial willingness to

interpret otherwise unqualified statutory provisions giving ministers wide authority to direct the police.

12.3.3 *The Ontario Police Services Act*

In contrast to the *Blackburn* doctrine, the *Ontario Police Services Act* and the *RCMP Act* both give the provincial and federal Solicitors General very broad powers to direct their respective police forces.¹⁷

Because the wording of s. 5(1) of the *RCMP Act* is substantially similar to s. 17(2) of the Ontario's *Police Services Act*, the Supreme Court decision and reasoning in *Campbell and Shirose* is very likely applicable to the OPP and the *Police Services Act* as well. This section gives the responsible minister unqualified powers to direct the OPP:

17(2) Subject to the Solicitor General's direction, the Commissioner has the general control and administration of the Ontario Provincial Police and the employees connected with it.¹⁸

The *Police Services Act* is important to this discussion of police independence because of what it includes and what it leaves out. For example, the reference to statutory direction by the minister recognizes the Canadian tradition of ministerial responsibility. Taken to its extreme, however, the unqualified ministerial power to direct the OPP could obliterate any meaningful concept of OPP independence from government. By way of contrast, section 31(4) of the *Police Services Act* is explicit on the subject of police independence with respect to municipal police services boards. This section states that "the board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police." There is no equivalent limitation on the provincial Solicitor General with respect to the OPP. As a result, it could be argued that the *Act* gives the provincial Solicitor General broad powers to intervene in OPP policy and operations. As a practical matter, however, it is likely that most provincial policy-makers believe that the s. 31(4) limitation also applies to the provincial Solicitor General in his or her dealings with the OPP as well.

Irrespective of any practical understanding of s.17 (2), the legal distinction between the provisions governing the OPP and municipal police services is potentially confusing.

Also confusing is the absence in the *Act* and its regulations of any definition of "police independence," "directives and guidelines," "operational decisions," or "day-to-day operations of the police." Nor is there any legislative or regulatory direction on questions regarding government intervention in what is

sometimes called the “policy of operations” or direction regarding the minister’s power to intervene in individual cases. Nor does the *Act* specify the process by which the Solicitor General is to give directions or how the public is to be informed of them.

These ambiguities and inconsistencies are not idle considerations. In the past, courts have used the plain language of similar legislation to reject the common law principle of police independence.¹⁹

The OPP submission in Part 2 emphasized several practical problems with the current legislative provisions. The OPP noted, for example, that in the context of policing Aboriginal occupations and protests

the conventional understanding that the police have independent authority for “operations” and government has authority to direct “policy” should not translate into prohibitions from information sharing that may reasonably advance informed policy making, on one hand, and informed operational decisions, on the other hand.²⁰

The OPP also noted that while the set of statutory provisions which prohibits police service boards from directing specific operations or the day to day operations of the police “undoubtedly cautions against obvious improprieties,”

[these provisions do not] ... in the absence of further clarity, address appropriate interventions where operational and policy decision-making are specific and made “day to day” in connection with an Aboriginal occupation or protest.²¹

12.3.4 Previous Commissions and Inquiries

As noted above, this Inquiry is the fifth major public inquiry or commission to consider the proper relationship between police and government.

12.3.4.1 The McDonald Commission

The earliest and perhaps most comprehensive review of police/government relations in Canada is included in the Commission of Inquiry Concerning Certain Activities of the RCMP (the “McDonald Commission”). This report was released in 1981.

The commission was called in response to a public controversy over government involvement in policing after it was revealed that the federal government was involved in directing activities of the RCMP security services in the wake of the 1970 October crisis. This episode resulted in sustained public debate about the appropriate relationship between the police and the government.

The McDonald Commission considered the balance between police independence and ministerial control at length in its report. The commission concluded that responsible ministers should have extensive authority to direct, comment upon, or be advised of a wide range of police activities, including areas traditionally considered police “operations.” The commission defended ministerial involvement in these areas on the basis of democratic principles:

We take it to be axiomatic that in a democratic state the police must never be allowed to become a law unto themselves. Just as our form of Constitution dictates that the armed forces must be subject to civilian control, so too must police forces operate in obedience to governments responsible to legislative bodies composed of elected representatives.²²

The commission rejected any distinction between “policy” and “operations” which would insulate “the day to day operations of the Security Service” from ministerial review and comment. To do so would result “in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of ‘operations’ and are thus outside the Minister’s purview.”²³

The commission agreed with *Blackburn* only to the extent that

[t]he Minister should have no right of direction with respect to the exercise by the R.C.M.P. of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in *Ex parte Blackburn* be made applicable to the R.C.M.P.²⁴

Even with respect to “quasi-judicial” police functions of investigation, arrest, and prosecution, the McDonald Commission drew a distinction between accountability and “answerability” on the one hand, and control and direction on the other. The commission concluded that the minister should have a right to be

informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases, he may give guidance to the Commissioner and express to the Commissioner the government’s view of the matter, but he should have no power to give *direction* to the Commissioner.²⁵

The McDonald Commission also concluded that the federal government should have broad authority to establish “policies of operations” governing police operational procedures.

12.3.4.2 *The Marshall Commission*

The Royal Commission on the Donald Marshall Jr. Prosecution is best known for its examination of the wrongful conviction of Donald Marshall Jr. However, the Marshall Commission also considered police/government relations in the context of examining two cases where Nova Scotia Cabinet members had been the subject of RCMP criminal investigations but were not criminally charged.

The Marshall Commission limited police independence from government to the process of criminal investigation, concluding that “inherent in the principle of police independence is the right of the police to determine whether to commence an investigation.” The commission believed that, in an appropriate case, the police should be prepared to lay a charge, even if it was clear that the Attorney General would refuse to prosecute the case. This was necessary to “ensure protection of the common law position of police independence and acts as an essential check on the power of the Crown.”²⁶

12.3.4.3 *The APEC Inquiry*

The next major inquiry to consider police/government relations was the APEC Inquiry.²⁷ The APEC Inquiry is important in this context because one of the significant controversies at the inquiry involved allegations that the Prime Minister’s Office interfered with RCMP security operations at the APEC conference in order to keep protesters away from the Indonesian president.

The chair of the inquiry, Mr. Justice Ted Hughes, stated five principles or findings about police independence:

- When the RCMP is performing law enforcement functions (investigation, arrest and prosecution) they are entirely independent of the federal government and answerable only to the law.
- When the RCMP are performing their other functions, they are not entirely independent but are accountable to the federal government through the Solicitor General of Canada or such other branch of government as Parliament may authorize.
- In all situations, the RCMP is accountable to the law and the courts. Even when performing functions that are subject to government direction, officers are required by the RCMP Act to respect and uphold the law at all times.
- The RCMP is solely responsible for weighing security requirements against the Charter rights of citizens. Their conduct will violate the Charter if they give inadequate weight to Charter rights. The fact that

they may have been following the directions of political masters will be no defence if they fail to do that.

- An RCMP member acts inappropriately if he or she submits to government direction that is contrary to law. Not even the Solicitor General may direct the RCMP to unjustifiably infringe Charter rights; as such directions would be unlawful.²⁸

Justice Hughes also recommended that the “RCMP should request statutory codification of the nature and extent of police independence from government” with respect to “existing common law principles regarding law enforcement” and “the provision of and responsibility for delivery of security services at public order events.”²⁹

In the end, neither the *RCMP Act* nor the *Ontario Police Services Act* was amended following the APEC recommendations. However, the RCMP officially adopted the five principles which Justice Hughes advanced in his report to guide the force in its relations with government in public order policing. These principles are now included in the RCMP Tactical Operations Manual.

12.3.4.4 *The Arar Commission*

The most recent public inquiry to discuss the issue of police independence was the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar (the “Arar Commission”). Justice Dennis O’Connor, Associate Chief Justice of Ontario, was the chair of the commission. In the policy part of his report dealing with a review mechanism for the national security activities of the RCMP, he discussed police independence at length:

The outer limits of police independence continue to evolve, but its core meaning is clear: the Government should not direct police investigations and law enforcement decisions in the sense of ordering the police to investigate, arrest or charge — or not to investigate, arrest or charge — any particular person. The rationale for the doctrine is the need to respect the rule of law. If the Government could order the police to investigate, or not investigate, particular individuals, Canada would move towards becoming a police state in which the Government could use the police to hurt its enemies and protect its friends.³⁰

Justice O’Connor also stressed that police independence was not absolute, and that “complete independence would run the risk of creating another type of police state, in which the police would not be answerable to anyone.”³¹ He stressed that

“the Minister has a responsibility to provide policy direction to the police,” ideally through public and written directives.³²

12.3.5 *Where Are We Today?*

I have set out this short history of police independence to demonstrate that many issues are still unresolved, even though it has been almost forty years since the decision in *Blackburn*. I also wanted to demonstrate that the fundamental legal and policy framework governing police/government relations in Ontario has remained largely unchanged since Ipperwash.

The most significant legal or policy development in the past twelve years was the Supreme Court of Canada decision in *Campbell and Shirose*. This case establishes that government should not direct the police on specific law enforcement decisions, including who should be investigated, arrested, and/or charged, and when. (I refer to the “law enforcement” function as the “core of police independence” in the balance of this report.) As such, *Campbell and Shirose* brings legal certainty to one vitally important question about police/government relations. However, *Campbell and Shirose* did not provide a full or even a partial answer to several outstanding issues that have vexed police/government relations since *Blackburn*, including the following:

The limits or boundaries of police independence outside the core area of law enforcement are either vague or confusing. It is not clear if, when, or how governments may intervene in areas beyond that core. Court decisions on police independence have never been reconciled with the Canadian statutory framework for police/government relations, resulting in important gaps in our understanding of the scope of police independence. These issues have not been resolved by the Supreme Court of Canada, legislation, regulations, or any internal government or OPP policies of which I am aware:

- Fundamental concepts including “police independence,” “policy,” and “operations” are not defined in any statute, regulation, or formal policy.
- There are no statutory, regulatory, or policy definitions of important provisions in the *Police Services Act*, including “subject to the Solicitor General’s direction,” “specific operational decisions,” or “day-to-day operations of the police” which might provide some guidance in the absence of general definitions.
- There is very little legislative, regulatory, or policy direction on questions regarding government intervention in the “policy of operations” or the minister’s authority with respect to individual cases.

It appears that ministerial accountability for the OPP needs to be strengthened:

- It is not clear *who* has the right to intervene in police activities. The *Police Services Act* gives the Minister of Community Safety and Correctional Services the authority to direct the OPP, yet it appears that other ministers or officials sometimes give direction or guidance to the police during specific incidents.
- Moreover, non-MCSCS ministers continue to speak on behalf of the OPP in the Legislature. There is also no apparent protocol or set of rules regarding the roles of political staff or non-MCSCS ministries or ministers, meaning that ad hoc or vague government directions may be given by people who may or may not have authority to speak on behalf of the government.

The *Police Services Act* does not specify the process by which the Minister of Community Safety and Correctional Services can give directions, nor how the public is to be informed of them, if at all. There is no established or transparent process for recording government directions or the police response during a crisis. Nor is there a transparent, public process for identifying disagreements about police/government relations.

There is no apparent policy setting out the process for or expectations of police/government relations during a crisis. This is true despite the increasing and significant acknowledgement that police and governments will often have to have to work together closely to resolve situations like Aboriginal occupations and protests peacefully. Indeed, sections of the *Police Services Act* arguably discourage attempts to exchange information.

There is very little public transparency or accountability for decisions made by either the police or government on police/government relations or during a crisis.

Quite frankly, this short list makes it apparent that the confusion and deficiencies so apparent in police/government relations at Ipperwash largely continue to this day. It appears that police/government relations in Ontario are still largely governed by informal conventions and understandings about the roles and responsibilities of key institutions and individuals. Police/government relations and police independence in Ontario continue to rely very heavily on the personal integrity and leadership qualities of key decision-makers.

12.4 Democratic Accountability

My analysis and recommendations in Part 2 are informed by certain guiding principles which, in my view, must be respected in order to avoid future tragedies

similar to the death of Dudley George. In the context of police/government relations, the most important guiding principles are related to democratic government and the need to promote transparency and accountability. These principles do not necessarily tell us what provincial policing policies should be. They do, however, tell us how the government should apply those policies. Simply put, these principles require that substantive provincial policies be implemented in a manner that is transparent, accountable, and consistent with the principles of democratic government.

Without transparency, there is no accountability. It is impossible to hold individuals or institutions responsible for their actions unless what happened and who participated in key decisions is clear. Secrecy or the lack of transparency is a breeding ground for abuse of power, public cynicism, and attacks on the legitimacy of important public institutions. Secrecy or lack of transparency in police/government relations may conceal inappropriate government interference in policing or give the appearance of inappropriate interference.

The policies and guidelines necessary to achieve accountability undeniably limit the power of the government or police to act unilaterally. Yet they also give the government and police more legitimacy when those powers are exercised.

Accountability is somewhat difficult to define. For some, there is no accountability without control and consequences. For others, accountability can be achieved simply by requiring those in power to explain their actions and to answer questions. The effectiveness of accountability is ultimately a matter of degree and context. At the same time, accountability of any kind will be impossible without transparency.

12.4.1 Ministerial Accountability

The principles of transparency and accountability are embedded in our democratic institutions. In our system, responsible ministers are expected to answer questions about the actions of the government in the legislature. When responding to questions, ministers are expected to explain the government position and to assume responsibility for government actions. The *Police Services Act* recognizes the principles of ministerial accountability by providing that the commissioner of the OPP is “subject to the Solicitor General’s direction.”

In Canada, the most extensive discussion of the concept of ministerial responsibility in the context of policing took place in the McDonald Commission. The McDonald Commission concluded that responsible ministers should have extensive authority to be advised of and to comment on a wide range of police activities. The commission defended ministerial involvement on the basis of democratic principles and ministerial accountability.

I believe that police and government policy-makers in Ontario share this view today. For example, Larry Taman, the Deputy Attorney General at the time of Ipperwash, spoke about the importance of governmental accountability for the police in his testimony at the Inquiry:

In my view, it's very important to keep up front the notion that the government is accountable for the actions of the police and when I hear people talk about the independence of the police or the police are independent, I think it's a statement that's too broad. I think that it's right to say that with respect to certain kinds of issues, that the government had best stay out of it and let the police do their job. For all I know, there may even be one or two issues where there is some legal impediment to the government being involved. But it's important to remember that overall, the police work for the government. They're accountable to the people through the Government and, in my view, this is critical. And it may be easy for people to say that the police should be independent when they wish something else had happened, but people don't like it very much when the police do other things and the government doesn't seem to be anywhere to be found.³³

The theory of ministerial responsibility is that every department of government, including the provincial and national police forces, has a responsible minister who can account for the activities of that department in the legislature and who can assume responsibility for its decisions.

Many commentators have argued that the principle of ministerial responsibility is outdated, because ministers cannot reasonably be expected to know or supervise the activities within large, modern bureaucracies. Many people have also observed that modern governments require strong central agencies that cut across ministerial lines to coordinate governmental activities and to ensure that the government as a whole can implement its policy objectives.³⁴

The complexities of modern government necessarily cast significant doubt on the effectiveness of ministerial accountability to govern police/government relations or to govern police activities. At the very least, the patterns of traditional ministerial accountability and responsible government have eroded to a significant extent since the McDonald Commission defended its vision of democratic policing based on ministerial responsibility.

Notwithstanding these difficulties, I believe that ministerial responsibility must remain the fundamental organizing structure to govern police/government relations.

Ministerial responsibility continues to impose a discipline or accountability

on individuals and activities within a government department, even if the minister is not personally involved in the activity. Ministerial responsibility requires the minister to answer for all activities in his or her department, even those that the minister cannot necessarily control or direct. This responsibility has a cascading effect throughout a ministry or agency which increases accountability, improves decision-making, and promotes consistent policies and activities throughout a government department. In many respects, ministerial responsibility is the glue that holds a ministry together.

The challenge to ministerial accountability in police/government relations is acute during the policing of Aboriginal occupations and protests. I have already mentioned the multiplicity of government agencies or ministries that can be involved in these incidents. Ipperwash itself is a prime example. Much of the government policy input at Ipperwash came through an interministerial committee, the Premier, or other members of Cabinet. Government information, advice and directions were not always channelled through the Solicitor General, who was, of course, the minister responsible for the OPP. Government decision-making and involvement in this manner significantly erodes ministerial responsibility and accountability.

12.4.2 Police Accountability

The police exercise special powers in our democracy. The police and the police alone have the authority to use coercive force in our society. We depend on the police to exercise their powers reasonably and lawfully to protect our personal safety and public order. Moreover, successful policing is dependent to a very large degree on public consent and legitimacy. Public consent, in turn, depends on public accountability.

Police independence is a crucial safeguard against those powers being used inappropriately or for political ends. However, police independence cannot be used to insulate the police from democratic accountability or the need to explain their actions. In a democracy, it is perfectly consistent to protect the core of police independence while at the same time requiring the police to explain and justify their activities and policies. The Patten Report articulated the fundamental connection between independence and accountability simply and eloquently:

The police are in a uniquely privileged position. It is their task to uphold the rule of law, exercising their independent professional judgement in doing so. That independence is rightly prized as a defence against politicization of policing and the manipulation of the police for private ends. The police do not serve the state, or any interest group:

they serve the people by upholding the rights and liberties of every individual citizen. But the proper assertion of independence should not imply the denial of accountability.³⁵

People need to know and understand what their police are doing and why. This is important if the police are to command public confidence and active cooperation. Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.³⁶

Police accountability takes many forms. It can be “subordinate and obedient” or “explanatory and cooperative”:

In the subordinate sense, police are employed by the community to provide a service and the community should have the means to ensure that it gets the service it needs and that its money is spent wisely. Police are also subordinate to the law, just as other citizens are subordinate to the law, and there should be robust arrangements to ensure that this is so, and seen to be so. In the explanatory and cooperative sense, public and police must communicate with each other and work in partnerships, both to maintain trust between them and to ensure effective policing, because policing is not a task of the police alone.³⁷

Transparency is accountability in the “explanatory and cooperative” sense ... People need to know and understand what their police are doing and why. This is important if the police are to command public confidence and active cooperation. Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.³⁸

I believe that democratic government and ministerial accountability depend on the responsible minister’s having a very expansive authority to ask questions about police policies and operations. Subject to very limited exceptions, I believe that this authority should extend to being informed of any operational matter, even one involving an individual case, if it raises important questions of public policy. In this respect, I agree with the Patten Report that “the presumption should be that everything should be available for public scrutiny unless it is in the public interest—not the police interest—to hold it back.”³⁹ Similarly, the Arar Commission report stressed the need for the responsible minister to be informed about RCMP conduct

and be answerable to Parliament and the Canadian public for conduct that is inconsistent with the rule of law or with public policy. Without such answerability, we run the risk, particularly concerning activities that are not reviewed by the courts, of the police not being accountable to anyone.⁴⁰

12.4.3 Transparency

The principles of transparency and accountability are closely related. Before any person or institution can be held responsible for a decision, it is necessary to know, as precisely as possible, what that person or institution did or did not decide.

Transparency is important not for its own sake, but to ensure that both the police and the government can be held accountable fairly for their decisions. In this way, transparency is a necessary precondition for accountability. In addition, both transparency and accountability promote democratic government by making clear to the public the respective decisions made by the police and the government. This allows the responsible minister and his or her government to be publicly questioned and evaluated on their activities and decisions.

Respect for democratic government, transparency, and accountability are fundamental to my analysis and recommendations concerning police/government relations. Indeed, most of my recommendations focus on improving transparency and accountability for police and government decision-making.

12.5 The Boundaries of Police Independence

We have already seen that *Campbell and Shirose* establishes that the core of police independence is that the government should not direct the police with respect to law enforcement decisions. The next issue is to determine the boundaries of police independence, including questions about government authority to intervene in police decision-making beyond that core of law enforcement.

The debate on this issue centres around four issues that tend to be crucial to the policing of Aboriginal occupations and protests and police/government relations generally:

- The distinction between “policy” and “operations”
- The “policy of operations”
- Whether police and government can or should exchange information during a police operation
- The distinction between government “guidance” and “direction”

My analysis will demonstrate that the apparently simple and understandable dichotomy between policy and operations and between police responsibilities and government responsibilities are not clear at all. I believe the better policy is to acknowledge that the police and the government have unique, complementary, and sometimes overlapping roles and responsibilities for policy and operations. In my view, the concept of police independence must be modernized in order to explicitly acknowledge the shared responsibilities of police and government for both policy and operations.

12.5.1 Policy and Operations

12.5.1.1 Law

The starting point for any discussion of the distinction between operational and policy matters is section 31(4) of Ontario's *Police Services Act*. This is the section of the *Act* governing police/government relations for municipal police services. It specifies that local police boards will not direct the chief of police "with respect to specific operational decisions or with respect to the day to day operations of the police."

The provisions of this section reflect the conventional and widespread understanding of police/government relations in which the police have independent authority to determine "operations" and governments have authority to direct "policy." This theory is a balance between the need to acknowledge police professionalism and expertise and the importance of non-partisan policing on the one hand ("operations") with the need for democratic input and control of public policy on the other ("policy"). This interpretation is reinforced by section 3(2)(j) of the *Act*, which gives the Solicitor General the authority to "issue directives and guidelines respecting policy matters." By way of contrast, the OPP has neither a police board nor any statutory provision explicitly restricting the minister's authority to direct the commissioner of the OPP.

Nevertheless, it is very likely that most if not all provincial policy-makers and police officials believe that the policy/operations distinction applies to the OPP as well. Indeed, the distinction between policy and operations is acknowledged widely. Virtually every senior provincial or police decision-maker who testified in Part 1 noted it in some fashion.

12.5.1.2 Definitions

The benefit of the policy/operations distinction is that it provides decision-makers with an apparent bright line where police independence ends and permissible governmental intervention can begin. Of course, the meaning of

terms “policy” and “operations” is not self-evident. They are more accurately considered terms used to “roll up” important ideas about when and how governments should intervene in policing decisions.

What, then, is the difference between “policy” and “operations?” I have already pointed out that the phrases are not defined in any statute, regulation, or policy of which I am aware. Nor is there any definitive judicial interpretation of the distinction between policy and operational matters under section 31(4) of the *Police Service Act*.

The *Canadian Oxford Dictionary* (2nd ed.) provides a less technical definition of “policy” as a “course or principle of action adopted or proposed by a government, party, business, or individual.” “Operation” is “1. (a) the action or process or method of working or operating. (b) the state of being active or functioning. (c) the scope or range of effectiveness of a thing’s activity. 2. an active process; a discharge of a function.” These definitions are very similar to those proposed by former Ontario Deputy Attorney General Larry Taman. He told the Inquiry that he considered policies to be “rules” and operations to be the “application of the rules.”⁴¹

12.5.1.3 *Drawing the Line*

Notwithstanding these helpful definitions, it is obvious that the distinction is often very difficult to apply in practice. Experience demonstrates that the line between a policy and an operational issue may be unclear or may be the subject of reasonable yet conflicting interpretations. This may be particularly true in a crisis, when important matters of policy may arise for the first time. What complicates matters further is that it is entirely possible for an “operational” issue to become a “policy” issue during the same event as circumstances, consequences, interpretations, or politics evolve.

The difficulty in drawing the line was quite rightly acknowledged by several witnesses at the Part 1 hearings, including Mr. Taman and Dr. Elaine Todres, the Ontario Deputy Solicitor General at the time of Ipperwash. Dr. Todres noted that even the statement “remove the occupiers from the park” could be characterized as either policy or operations.⁴² In her valuable study for this Inquiry, the late Professor Dianne Martin concluded that “conflicts about what is policy and what is an operation are unavoidable and difficult to resolve.”⁴³

The increasing complexity of policing (and government, for that matter) means that the dichotomies between police/government and policy/operations are no longer, by themselves, sufficient to guide policy-makers and decision-making on either side of the issue. Moreover, applying the distinction in practice

is more likely to be difficult if the police and the government do not have clear or settled expectations about how such events will be policed. In these circumstances, it is more likely that police and governments will be confronted by novel issues that will force them to decide quickly whether a matter is “policy” or an “operation.” Debates of this sort can only complicate what are often already dynamic and volatile situations.

Given these circumstances, some commentators have concluded that a definitive definition of “policy” and “operations” is both unwise and/or impossible, including, for example, the Patten Report:

One of the most difficult issues we have considered is the question of “operational independence.” Some respondents urged us to define operational independence, or at least to define the powers and responsibilities of the police We have consulted extensively in several countries, talking to both police and to those who are responsible for holding them accountable. The overwhelming advice is that it is important to allow a chief constable sufficient flexibility to perform his or her functions and exercise his or her responsibilities, but difficult if not impossible to define the full scope of a police officer’s duties.⁴⁴

Notwithstanding these obvious conceptual and practical difficulties, I am unwilling to abandon the policy/operations distinction. I believe that the basic objective of the distinction—to protect police expertise and non-partisan policing on the one hand while recognizing the legitimate role of democratic governments to establish policies on the other—is as relevant today as it was almost forty years ago when *Blackburn* was first decided. I am also influenced by the fact that the distinction is already incorporated in the *Police Services Act* and acknowledged by policy-makers and police officers across the province.

Having reached this conclusion, I want to stress that I do not believe that the existing legislative provisions or provincial policies are in any way sufficient. I believe that provincial policies must identify criteria that assist police and policy-makers to distinguish between policy and operational issues both during and in advance of critical incidents. This approach necessarily depends on trying to identify what values, interests, or objectives the words “policy” and “operations” are intended to represent in the first place.

It may be simpler to begin by describing what types of decisions would likely fall into the category of “operations.” These would certainly include decisions within the law enforcement core of police independence established by *Campbell and Shirose*.

Depending on the circumstances, “operational” decisions could also include decisions which the police alone, because of their expertise, have the competency to address. These may also be called “expertise” decisions which, in most circumstances, should be left to the police because of their professional training and knowledge. In some circumstances, these decisions could also be called “tactical” decisions. A final category of “operational” decisions might be called “implementation” decisions, where the police have been given the responsibility to execute the previously identified and agreed-upon policies or protocols intended to guide them.

“Policy” decisions, on the other hand, tend to arise when the normal police “operational” decision-making processes or structures are deemed to be inappropriate or insufficient to address an issue. In these circumstances, government policy intervention may be needed to choose between competing public priorities, to identify or resolve non-policing issues, to establish precedents for future decision-making, to vindicate important democratic principles or rights, or when the issues are otherwise within the realm of public policy. Governments will also always have the right to make policy decisions within areas of their legal authority. As a practical matter, an operational decision may require some kind of policy intervention if the operational decision

- Requires unexpected financial or other resources
- Could affect third parties or issues not directly involved in the situation/issue
- Is necessary to vindicate or balance legal/democratic principles or rights with policing priorities and practices
- Raises interjurisdictional issues
- Could set a precedent for similar operational situations in the future
- Requires intervention of higher-levels of authority to resolve the operational issue
- Must be made in a policy or operational vacuum, where operational decision-makers do not have existing policies or protocols to guide them

Another important criterion for determining whether something is “policy” or “operations” is whether the policy direction proposed by the government can be applied to other situations. For example, policies with respect to the use of force or to negotiation with protesters should be generally applicable to similar disputes, even when the policy was first made in the context of a specific dispute.

The general criteria for the policy interest of the government in policing are

also closely related to the values of transparency and accountability. In other words, to be transparent and accountable, government policies should generally be capable of being written down, circulated, and applied in similar cases. It is hard to justify giving governments the authority to issue “policy” directions that cannot or will not be written down and made available to the public at some point.

I want to emphasize that the criteria I have identified cannot and should not be considered definitive or exhaustive benchmarks for the demarcation between policy and operations. On the contrary, this approach assumes that policy and operations will always be fluid concepts, subject to reasonable interpretation and reinterpretation depending on the context. This approach is also conditional upon adopting measures to ensure that all government “policy” directions and most police “operational” decisions are transparent and accountable, irrespective of where the policy/operation line is drawn in specific circumstances.

I hasten to add that even when the government occupies the policy field, the police will still retain discretion and independence with respect to many operational matters in implementing the government policy. For example, the police would still retain the discretion to decide when to arrest people, even if the government issued a clear and transparent policy declaring that an Aboriginal occupation will be considered a simple matter of trespass. The core of police independence would be meaningless if the government could direct when and/or how to enforce the law. This means, for example, that neither the responsible minister nor anyone else in government should attempt to specify a time period in which to remove protesters. To do so would intrude on the law enforcement discretion of the police and their expertise about whether arrests can be made and how to arrest people safely.

12.5.2 Policy of Operations

An important category, or subcategory, of the government authority to establish policing policy concerns the “policy of operations.” The phrase is usually attributed to the McDonald Commission, because that commission discussed the concept at length in the course of its examination of the national security activities of the RCMP.

The McDonald Commission concluded that the government, through the responsible minister, had a legitimate interest in policies that guided operations. The commission defined “the policy of operations” as

those policies which ought to be applied by the Security Service in its methods of investigation, its analysis of the results of investiga-

tions and its reporting on those results to government. All policies of operations must receive direction from the ministerial level. For instance, whether or not a particular new foreign target ought to be the subject of surveillance and, if so, what methods of surveillance ought to be employed are a matter of policy even though such a decision could clearly be described as involvement in operations. Policy and operations in the security field are not severable and any attempt to make them so is doomed to failure.”⁴⁵

The commission discussed the “policy of operations” primarily in the context of its proposed new national security intelligence agency. However, the commission indicated that its recommendations concerning ministerial knowledge and direction of “policy of operations” were also applicable to the RCMP:

In our view, the methods, practices and procedures used by the RCMP in executing its criminal law mandate — the ‘way in which they are doing it’ to borrow the Prime Minister’s words — should be of continuing concern to the appropriate Minister. We believe that the Solicitor General of Canada has not only the right to be kept sufficiently informed but a duty to see that he is sufficiently informed.⁴⁶

The Arar Commission also affirmed the importance of ministerial involvement in the policy of operations in the area of national security law enforcement. More specifically, the Arar Commission commended the use of ministerial directives to provide policy guidance to the RCMP on operational matters related to the national security functions of the RCMP.⁴⁷

I agree that the provincial government should have the authority to establish a “policy of operations” for the OPP and other police services in Ontario. I believe that this is a legitimate and beneficial exercise of the policy-making function of the provincial government, as the McDonald and Arar commissions also concluded.

The three ministerial directives issued to the RCMP which were cited in the Arar Commission report provide a useful illustration of the scope and benefits of ministerial directives. These directives address information-sharing agreements between the RCMP and other agencies, RCMP investigations into sensitive sectors such as unions, religious institutions, and academia, and the requirement that the RCMP inform the minister of investigations likely to give rise to controversy. Each directive establishes the government’s general expectations for how the RCMP will perform its duties in certain sectors or situations. In so doing,

the federal government has transparently and prospectively stated its policy and operational objectives in these fields. Because the directives are transparent, accountability is enhanced. Because they are prospective, the possibility of controversy or inappropriate activities is reduced.

The RCMP has publicly acknowledged that these directives are helpful in establishing a policy framework for areas of RCMP activities requiring clarification by the political executive. The RCMP has also stated that the directives provide it with standards, in selected areas of policing activity, for achieving a balance between individual rights and effective policing practice. The RCMP has further stated that the directives are valuable because they inform the public about the character of the supervision of the RCMP provided by the political executive.⁴⁸

There are many examples of “policies of operations” at the federal and provincial levels. One notable “policy of operation” established by the Ontario government is the Interim Enforcement Policy (IEP).

Like the RCMP, the OPP agreed that it is appropriate and often beneficial for governments to establish “policies of operations”:

It is appropriate that government make policies that generally affect police operations ... Indeed, statutes and regulations that govern police conduct and standards (*Criminal Code, Highway Traffic Act, Police Services Act, Provincial Adequacy Standards* etc.) represent policy decisions by governments that directly impact upon operations. Policy decisions to prioritize enforcement against “guns and gangs,” illegal biker activities or terrorism represent choices that directly impact upon police operations. Accordingly, one must avoid oversimplifications that deny government’s legitimate policy role in operational matters. The phrases “specific operational decisions” and “day to day operations of the police” are no doubt designed — albeit imperfectly — to acknowledge government’s legitimate role in “policies of operations”, while avoiding interference in specific operations so as to induce partisan policing or its appearance.⁴⁹

My analysis so far has focused on *how* policy and operations intersect. I believe that it is equally important to emphasize that very often policy and operations *should* intersect. Sound government policy decisions are very often informed by police operational policies. Operational decisions by the police are, in turn, appropriately informed by government policy decisions.

12.5.3 *Exchanging Information*

Is it appropriate for the police and government to exchange information during an incident? Is it appropriate for government to ask the police to provide it with information about the conduct of an operation? Can these requests be distinguished from attempts to influence the police on operational matters?

The McDonald Commission concluded that the responsible minister should always have a right to be informed of any operational matter, even one involving an individual case, if it raises an important question of public policy.⁵⁰ The Arar Commission also affirmed that the minister should be informed about RCMP conduct.⁵¹ The Patten report similarly recommended that, in almost every case, the policing board should be able to require a report from the chief constable, even with respect to operational matters.⁵²

I agree that the government has a legitimate authority and often a significant interest in receiving information from the police about ongoing police operations. This authority is justified by the principle of ministerial accountability.

I have also concluded that the government very often has the responsibility to keep the police updated on relevant policy decisions if it can be reasonably foreseen that those decisions will affect police operations or public safety.

The need for full and frank exchange of information between police and government is very much a two-way street. Mutual information exchange promotes better policy *and* operational decision-making. I believe that it would be a mistake, therefore, to simply prohibit exchanges of information between the police and government. The OPP supported this view. The OPP told the Inquiry that the “ability of police to make sound operational decisions ... require[s] that government communicate relevant policy decisions to the police, but do so in a timely way”:⁵³

Experience provides many illustrations of this point. For example, if a government decides to negotiate with occupiers, or having so negotiated, decides to terminate those negotiations, these decisions often impact upon public safety issues, and will generally compel the OPP to consider what resources should be available or what proactive steps should be taken to reduce the risk of violence when those government decisions are made known. A decision by government to terminate negotiations may require additional officers or the POU to at least attend the scene, or cause ART members to discuss with the occupiers their mutual expectations, and how the public safety issues might be addressed.⁵⁴

Information should flow both to and from the police. Care must be taken,

however, to ensure that the information exchanged is reliable and accurate. Care must also be taken to ensure that information exchanges do not become covert or veiled attempts to inappropriately direct police operations. Therefore, any direction given to the police must be given in a transparent and clear manner that is consistent with the statutory and political accountability of the minister responsible for the OPP. As a general rule, any and all directions provided to the police should be in writing. The police should also have access to processes by which they can request that any informal attempt by government to direct or influence them be directed through appropriate ministerial channels and be formalized in writing.

Ministerial accountability is particularly important in the context of Aboriginal protests and occupations. The complexity of interests and issues involved in these situations often means that the police need to give and receive information from many different parts of government. Be that as it may, ministerial accountability requires that exchanges of information generally should be filtered through proper ministerial channels in an accountable and transparent manner.

In the context of a crisis, information and directions are often exchanged through emergency meetings, telephone calls, or other fast-paced or spontaneous communications. It is easy for meetings and communications like this to raise concerns about inappropriate, undocumented government interference in police operations. The September 6, 1995 “dining room meeting” is a typical example.

It will not always be easy to strike the appropriate balance in a crisis. The best way to minimize the risks of the fact or perception of inappropriate political or governmental interference is to establish institutional and procedural protections which ensure that contacts generally occur within established lines of communication and within ministerial lines of authority. The details of any information exchanged between police and government must also be recorded as quickly and as accurately as possible.

12.5.4 Guidance and Directions

Can the government provide “guidance” to the police on an operational matter without giving “direction”? In other words, can a government give its opinion to the police on an operational matter without crossing over into impermissible interference?

The McDonald Commission concluded that the responsible minister could not only request information about police operations, but also that he or she could “give guidance to the [RCMP] Commissioner and express to the Commissioner the government’s view of the matter, but he should have no power to give *direction* to the Commissioner.”⁵⁵ This distinction and recommendation is incorporated

approvingly in at least one of the provincial government's policy documents on police independence:

Although the Minister has, on this analysis, no right to intervene in particular cases where O.P.P. officers have exercised their quasi-judicial functions, the Minister may be informed of any particular operational matter, even in an individual case, if it raises an important question of public policy. In such cases, the Minister should be allowed to give guidance to the Commissioner and to express the government's view of the matter, but he should have no power to direct the Commissioner.⁵⁶

In my view, the distinction between guidance and direction is neither sound nor sustainable. I believe that all attempts to influence the police should be unambiguous and transparent.

Professor Roach's background paper for the Inquiry described the way many government actors in police/government controversies have defended their actions by arguing that they were either merely seeking information from the police or simply providing guidance to them:

At various junctures, responsible Ministers and their staff have relied on the controversial idea that they were seeking and conveying information to the police as opposed to directing or even influencing their actions. There is a danger that this distinction may be lost on the public and perhaps the police.⁵⁷

I accept the distinction frequently drawn between exchanging information and government attempts to influence the police. However, I do not accept the distinction between providing "guidance" and "direction" to the police. The prospect of "guidance" but not "direction" by the government almost inevitably creates an appearance of improper influence. It also creates an accountability-free zone in which governments would forever be able to plausibly deny responsibility for the reasonable interpretations of their actions. In my view, anything beyond the exchange of information between the responsible minister and the commissioner should take the form of clear and written directives to the commissioner. Anything less than that contradicts transparency and accountability—values that are central to this report. Interestingly, I am supported in this conclusion by helpful submissions made on behalf of the OPP:

If the government should not be *directing* the police in an operational sphere, it will generally follow that it should not be giving even

non-binding *advice* in that sphere. That is because any benefits associated with the sharing of those views will generally be outweighed by the danger that the non-binding advice will be perceived to constitute a direction or an attempt to improperly influence the police. As reflected below, if the communication takes place, concerns can be addressed through documenting the communication to enhance transparency and accountability.⁵⁸

12.6 Modernizing Police/Government Relations

My analysis of police/government relations has persuaded me that the concept or doctrine of police independence needs to be updated in light of a more contemporary understanding of how police and governments can and should work together in a modern democracy. In the remainder of this chapter, I will discuss and recommend a number of conceptual and institutional reforms which I believe will help modernize our law and policies on police/government relations.

12.6.1 Rethinking “Independence”

Any attempt to modernize police/government relations must begin with a reconsideration of the term “police independence.”

Simply put, the term “police independence” is misleading. The word “independence” suggests that the boundaries between police “independence” and government “authority” can be clearly articulated and understood. We have already seen that this is not always possible or advisable.

The word “independence” also implies a broad zone of independent, unfettered police discretion which is patently at odds with the fact that the police can be asked to explain their decisions and activities, even in the core area of law enforcement.

The term is also misleading and unrealistic because our democracy gives the responsible minister the right—and obligation—to decide policy matters, including “policies of operations.” The minister’s legitimate authority to intervene in these matters contradicts any pretence or suggestion of true “independence.”

Finally, it is not realistic or helpful to think of the government and the police as necessarily operating in clearly defined separate spheres. Rather, there are many overlapping areas where both the police and the government may have legitimate interests.

12.6.1.2 Police Operational Responsibility

The Patten Commission on Policing in Northern Ireland concluded that the term “police independence” should be abandoned in favour of the term “police operational responsibility” in order to emphasize the accountability of the police with respect to the exercise of their powers:

[L]ong consideration has led us to the view that the term “operational independence” is itself a large part of the problem. In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be “independent.” Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of “operational independence” — that it minimizes the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed — are powerful arguments, but they support a case not for “independence” but for “responsibility.” We strongly prefer the term “operational responsibility” to the term “operational independence.”⁵⁹

I agree that the term “police operational responsibility” is generally a better way to conceptualize and describe our contemporary understanding of what is often referred to as “police independence.” The term “police independence,” to the extent that it is realistically descriptive at all, should not apply beyond the core of police decision-making in the exercise of law enforcement powers in individual cases. In my view, any broader conception of “police independence” is outdated and potentially misleading. I believe that the concept of “police operational responsibility” better emphasizes the core values I have identified in this report.

12.6.1.3 Ministerial Policy Responsibility

Although I agree with the Patten Report that “police operational responsibility” is a better term than “police independence,” I do not believe that the report went far enough. In my view, “police operational responsibility” must be matched and balanced with the complementary and contemporaneous concept of “ministerial policy responsibility.” “Ministerial policy responsibility” recognizes and emphasizes that Canadian democracy depends on the appropriate minister’s bearing ultimate responsibility for the policies pursued by the police.⁶⁰

Explicitly establishing ministerial “responsibilities” is important because it clearly states that the responsible minister and his or her government have positive, enduring obligations to both develop and/or review policing policies and to explain and defend those policies in the legislature. In so doing, the concept of “ministerial policy responsibility” confronts and (it is to be hoped) discourages abdication or shirking of appropriate oversight and policy responsibilities by ministers or the government.

Government and ministerial shirking is a serious risk in police/government relations. I wholeheartedly agree with the late Professor John Edwards that “undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much as a fault as undue interference in the work.”⁶¹

In cases where there is a disagreement between the policies proposed by the police and those of the elected government, the responsible minister has the ability to direct the police to pursue his or her policies. The responsible minister must, of course, provide such policies in a transparent manner so that the minister and his or her government can be held accountable for those decisions.

In sum, I believe that the terms “police operational responsibility” and “ministerial policy responsibility” better represent the complex overlapping spheres of authority and responsibility that characterize the modern world of police/governmental relations. These terms also emphasize that both the police and the minister have a responsibility to explain and justify their actions to the public.

Another virtue of re-conceptualizing police independence is that the concept of complementary ministerial and police responsibility is already found in existing laws affecting both police and government. The police have a variety of peacekeeping and law enforcement duties under both the *Police Services Act* and the *Criminal Code*. Local police services boards also have a long list of “responsibilities” under section 31(1) of the *Police Services Act*. Finally, the minister has a variety of responsibilities with respect to policy-making and is subject to provincial standards which are implicit in the long list of obligations under s.3 of the *Police Services Act*. The acknowledgement of complementary responsibilities is, therefore, not only explicit in existing laws but it is also more consistent with the finest traditions of public service that should guide both the police and the government.

12.6.2 Four Models of Police/Government Relations

Professor Roach’s background paper for the Inquiry outlines four possible models of police government relations.⁶² Each model represents one stop on a spectrum

of alternative legal and institutional arrangements to govern police/government relations.

Models of this sort provide a convenient means of highlighting different policy options and the value choices and assumptions implicit in the choice of those policies. I analyze Professor Roach's models to determine which model best fits the principles and priorities I have identified. That model will then become the theoretical or policy foundation for detailed recommendations which follow later in the chapter.

Professor Roach's first model is "Full Police Independence." It is based on a broad interpretation of the *Blackburn* doctrine and the broad understanding of police independence articulated by former Prime Minister Trudeau. This model essentially holds that police should be free from governmental direction on *all* operational matters. It finds some support in s. 31(4) of the *Police Services Act* which provides that municipal police boards cannot direct the chief of police "with respect to specific operational decisions or with respect to the day to day operations of the police."

Many parties to the Inquiry made submissions and recommendations effectively supporting this model, likely premised on the belief that it creates an impermeable shield against the perception or fact of political or partisan influence. Support for this model is also likely based on a belief that the risks and consequences of inappropriate police behaviour are far fewer than the risks and consequences of inappropriate political interference.

Unfortunately, this model, taken to its logical extreme, could make the police a law unto themselves and significantly undermine ministerial responsibility. It could also encourage an abdication of political responsibility for the policy of policing. Full police independence also has the potential to defeat transparency and accountability if police accountability effectively becomes voluntary. The Canadian Civil Liberties Association (CCLA) raised a significant further objection to this model in its submission to the Inquiry:

Why should it be assumed that the government has a monopoly on political motivation? There is simply no reason to believe that police officials are bereft of such predispositions. And what about all the other prejudices that could shape police behaviour? It has been alleged, for example, that certain police operations have been influenced by racism or homophobia within the constabulary. As between the appointed police and the elected government, why should it be the police who have the right to make the last mistake?⁶³

Professor Roach's second model is "Core Police Independence." This model is based on a more limited interpretation of police independence, defined by Professor Roach as "core" or "quasi-judicial" police independence. The model is based on *Campbell and Shirose*. It defines police independence as independence from governmental direction with respect to the exercise of law enforcement decisions.

"Core police independence" has an impressive pedigree. It is consistent with the approaches taken by the McDonald Commission, the Marshall Commission, the APEC Inquiry, and the Arar Commission.

This model strikes a more attractive balance between the principles I have adopted, because it protects police discretion to enforce the rule of law while allowing ministerial direction on a wide variety of other matters, most notably those affecting the policy of operations. Thus, this model is, potentially, in harmony with the concepts of overlapping zones of police operational responsibility and governmental policy responsibility. As a result, the "core police independence" model appears consistent with the principles of constitutional democracy and accountability.

A third model of police/government relations is "Governmental Policing." It defines police independence from government very narrowly. This model also accepts that central agencies within government will play a very important role in directing the police.

Although "governmental policing" undoubtedly reflects pressures and trends towards centralized authority within federal and provincial governments, it is inconsistent with the principles of democratic government and the explicit language of both the *RCMP Act* and *Police Services Act*. "Governmental policing" also has the very real potential to create situations in which different parts of government can interact with and perhaps even direct the police without taking responsibility.

Professor Roach's final model of police/governmental relations is "Democratic Policing." The starting point for this model is an acknowledgement of core or quasi-judicial police independence from government direction on law enforcement decisions. This model recognizes, however, that the responsible minister should be informed of all aspects of police operations in order to encourage explanatory and cooperative forms of accountability and to ensure the minister's authority to intervene in policy matters. Professor Roach explains that the democratic model of policing takes challenges to ministerial responsibility seriously and attempts to strengthen it by placing a new emphasis on transparent ministerial directives. This model is consistent with the general framework of the *Police Services Act* and with the general consensus of Canadian inquiries on police/government relations.

“Democratic policing” is distinguishable from “core police independence” because “democratic policing” is explicitly intended to promote transparency and public participation in policing policy. It also goes further than “core police independence,” in that it aims to revitalize ministerial responsibility and counter trends toward increasing government centralization. As a result, it is consistent with the responsibility of the minister under the *Police Services Act*, the principles of democratic government, ministerial accountability, and transparency. For these reasons, I believe that the “democratic policing” model is the most appropriate conceptual framework for police/government relations in Ontario.

12.6.3 Principles in Practice: Democratic Policing

The democratic policing model balances the principles and objectives identified in this report most effectively. It also creates a flexible, transparent, and accountable framework in which police and government can exercise their respective responsibilities, even in a fast-paced crisis. Indeed, flexibility, transparency, and accountability are the fundamental attributes of this model.

This model of policing is inherently democratic, because it recognizes that it is both impossible and undesirable to have static policing policies. Different ministers and governments will inevitably adopt different policing policies. The democratic policing model explicitly encourages the use of ministerial directives to ensure transparency and accountability for those changes.

Democratic policing also recognizes that it will be impossible to reach a consensus about the dividing line between police and government responsibilities in every situation. The flexibility inherent in ministerial directives means that they could be tailored to specific situations.

The final virtue of the democratic policing model is that it acknowledges and promotes democratic participation by encouraging policing policy to be debated, evaluated, and established in a transparent and accountable manner.

Of course, the policy instruments utilized to further democratic policing need not be limited to ministerial directives. There may be other institutional, policy, or procedural initiatives that promote democratic policing.

12.7 Promoting Democratic Policing

There is no shortage of accountability mechanisms for police/government activities. In addition to ministerial oversight and police services boards, the OPP and other police services in Ontario are subject to a wide range of internal and external accountability mechanisms, including questions in the Legislative Assembly, scrutiny by legislative committees, public complaints, civil lawsuits and criminal

prosecutions, freedom of information requests, Special Investigations Unit (SIU) investigations, the media, and coroner's inquests.

One of the harsh realities of Ipperwash, however, is that each and every one of these processes was utilized, at some point, to hold individuals and institutions publicly accountable. Yet it still took a public inquiry to uncover some of the key decisions that would eventually help the public understand the facts and issues accurately. This is clearly unsatisfactory by almost any standard of democratic accountability.

Public accountability and democratic policing cannot depend on this kind of sustained, expensive and time-consuming effort to get to the bottom of police/government relations issues or controversies.

Several parties to the Inquiry recommended interesting and potentially valuable reforms to improve police/government relations. For example, Aboriginal Legal Services of Toronto (ALST) recommended that the province establish a police service board for the OPP. I discuss this proposal later in this chapter.

ALST also recommended that the province promulgate a "political interference protocol" that would establish a mandatory procedure to be invoked when allegations of political interference with the police are made. The political interference protocol and similar recommendations seek to create new institutional processes or mechanisms to scrutinize police or government behavior following some kind of allegation or proof of government interference.

I have reservations about the political interference protocol and related proposals. There are already many accountability mechanisms for the OPP and other police services, including SIU investigations, coroner's inquests, freedom of information requests, civil lawsuits, criminal trials, and public inquiries, which have the ability to scrutinize the police/government relationship *after* some kind of crisis or controversy.

There is no reason to believe that new or additional "post-incident" accountability mechanisms will be any better at promoting better police/government relations than are any of the tools already available. I think that the more important objective should be to promote better police/government relations *before* an incident occurs. Just as importantly, I believe that police/government relations raises important public policy issues, irrespective of whether there is a public controversy.

My reservations should not be confused with acceptance of the status quo. Reforms are needed. I am convinced that the *Police Services Act* should be amended and policies should be changed to provide a clearer and modernized framework to govern police/government relations in Ontario. The emphasis in the new framework should be on clarifying roles and responsibilities while ensuring transparency and accountability in OPP and provincial government

decision-making. An important additional benefit of these reforms is that they are likely to promote better decision-making and reduce the occurrence of police/government relations controversies in the first place. I discuss the elements of this new framework in the following sections.

12.7.1 Clarifying Police and Ministerial Responsibilities

My analysis in this chapter has been directed in large part to reconciling the appropriate relationship between police independence and the overlapping and potentially confusing roles and responsibilities of police and government.

I have already discussed why I believe that the existing powers in section 17(2) of the *Police Services Act*, which give the commissioner general control over the OPP “subject to the Solicitor General’s direction,” are at odds with the general consensus about the law enforcement core of police independence.

As a first step, therefore, I recommend that s. 17 be amended to provide that the power of the Solicitor General to direct the OPP does not include directions with respect to specific law enforcement decisions in individual cases, notwithstanding the minister’s authority to issue directives under s.3(j) of the *Act*. This provision would both enshrine the principles found in *Campbell and Shirose* and provide greater certainty about the core meaning of police independence.

By itself, however, this provision would not resolve fundamental questions regarding police independence and the relationship between police and government. I believe that the *Police Services Act* should be further amended to specify that the commissioner of the OPP has operational responsibility with respect to the control of the OPP, subject to written policy directives from the Minister.

This second provision would enshrine the distinction between “police operational responsibility” and “ministerial policy responsibility” which I discussed earlier in this chapter. The term “operational responsibility” would firmly establish, if not emphasize, that the police can be held accountable after the fact for the manner in which they discharged their operational responsibilities. This amendment would also more firmly establish the authority of the responsible minister to assume responsibility for policy directives, including directives with respect to the policy of operations.

These amendments, taken together, would go a long way toward establishing an appropriate statutory foundation for police/government relations in Ontario.

12.7.2 Promoting Ministerial Accountability

A second important area of legislative reform in police/government relations is the need to promote the accountability of the minister responsible for policing

decisions. This reform would address the concerns raised in Ipperwash and elsewhere about the diffusion of decision-making and accountability for important policing decisions. Accordingly, I recommend that the *Police Services Act* be amended to prohibit any person other than the Solicitor General or his or her delegate from giving directions to the OPP. This provision would make it clear that it is never proper for another minister, an MPP, or a political staff person to purport to issue directions to the OPP unless that person was designated to do so. On its face, this reform would promote personal accountability and reduce extraneous, unaccountable interventions while acknowledging that the minister often conveys directions through his or her officials.

For greater certainty, the *Act* should also specify that ministerial directions must be directed to the commissioner or his or her delegate. Section 31(3) of the *Act* provides a strong precedent for this approach. This section prohibits members of local police boards from giving directions to any members of the police force and requires any direction to go directly to the chief of police. This amendment would underline that directions should always be directed through the OPP chain of command and should never go directly to the incident commander or any other police officer. This amendment would also ensure that any and all ministerial directions were addressed to police officials with the requisite rank, training, and experience to consider them.

I recognize that interministerial and intergovernmental committees often play an important and necessary role in determining the government response to large public order events and Aboriginal occupations and protests. It is nevertheless important in our democracy that government directions be channelled through the responsible minister. This is necessary to ensure transparency and accountability and to respond to the danger that the police will be placed in the impossible position of being faced with conflicting directions. A requirement that the direction be made by the Solicitor General or his or her designate also ensures that the content of the direction will be measured against the statutory obligations of the Solicitor General to refrain from direct law enforcement decisions in individual cases, and in a manner that is sensitive to the history of police/government relations and within the proper confines of the *Police Services Act*.

12.7.3 Revitalizing Ministerial Directives

The amendments I recommend would not resolve the definitional or practical problems regarding the precise ambit of the respective powers of the police and the government. As discussed earlier, there are a number of difficult issues concerning the relationship between policy and operations, the policy of opera-

tions, information exchanges between police and government, and the murky distinction between government “direction” and “guidance.”

In my view, these issues are not amenable to statutory definition or codification.

The model of democratic policing I recommend recognizes that the precise ambit and content of police operational responsibilities and governmental policy responsibilities will evolve over time. I am persuaded that the best way to approach the difficulties of distinguishing policy from operations is not through attempts at a static or legalistic definition, but rather by providing a process to resolve difficulties in defining policy and operations which will promote transparency and accountability and will be consistent with ministerial responsibility.

It may well be that the responsible minister will agree with the way the police discharge their operational responsibilities in most cases. Nevertheless, it is important, as the McDonald Commission recognized, for the responsible minister to have the option of intervening. I would add, however, that it is absolutely crucial that such intervention be in the form of a written ministerial directive which, perhaps with restrictions necessary to protect ongoing investigations and confidential information, will be made public.

Ministerial directives are attractive for a number of reasons:

Ministerial directives are a flexible yet transparent and accountable method for providing government directions to the police. There is no statutory limit on their potential application: they can be prospective, general, or specific.

Ministerial directives are also public documents. As a result, they are not subject to arguments about Cabinet confidentiality, litigation, or privacy privileges such as arose during the controversy over Ipperwash. Ministerial directives promote accountability for decision-making because they must be promulgated and withdrawn in public. Ministerial directives are also likely to be enduring statements of government policy. The fact that they are written down and public encourages policies based on best practices, rather than on ad hoc or crisis-driven agendas.

Finally, ministerial directives are neither novel nor expensive. Section 3(j) of the *Police Services Act* already gives the minister the explicit power to issue directives to police services across the province. The directive process does not require any new or costly institutional reforms.

It goes without saying that any process to revitalize ministerial directives must be accompanied by a public, transparent process for issuing, circulating, and withdrawing them. Any directives must also make it clear who issued them and to whom they are applicable and that they represent government policy. A ministerial directive issued in this manner would be a considerable improvement on the manner in which policy directions were communicated at Ipperwash.

There are some promising international and Canadian examples of ministerial directives being used as instruments to promote both transparent government policy-setting and ministerial responsibility.

Professor Stenning's comprehensive study of recent international experience with police government relations described the growing international trend toward promoting police/government transparency through the use of directives.⁶⁴ He noted, for example, that the recent *Police Reform Act* in the United Kingdom contemplates that local police authorities will prepare action plans to be approved by the Home Secretary. The *Act* also empowers the Home Secretary to issue "codes of practice relating to the discharge of their functions." A code of practice has been issued with respect to the use of firearms.

Professor Stenning also outlined important developments in several Australian jurisdictions, including the 1998 South Australia *Police Act*. This *Act* states that "Subject to this Act and any written directions of the Minister, the Commissioner is responsible for the control and administration of the South Australian police." The *Act* also provides that any ministerial direction to the commissioner must be published in the *Gazette* within eight days of issue and laid before each House of Parliament within six sitting days. René Marin approved of this legislation in a published analysis. In his view, the directive approach can bring "the transparency necessary to avoid potential conflict" and unfounded allegations of interference in "the very sensitive relationship between the Minister responsible for the police and police authorities."⁶⁵

The Queensland *Police Services Administration Act* likewise provides that the minister may give direction to the commissioner about "policy and priorities to be pursued in performing the functions of the police service," subject to the provision that all written directions should be kept and provided annually to the Crime and Misconduct Commission and then referred to the Parliamentary Committee on Crime and Misconduct.

Finally, section 37(2) of the Australian *Federal Police Act* provides that "the Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the functions of the Australian Federal Police." Professor Stenning concluded that the recent trend in Australia is

towards attempts to define and clarify the governance relationships between police commissioners and government ministers through legislative provision, rather than simply through recognition of constitutional convention A critical aspect of such provisions has been the requirement that ministerial directions that are given, must be in writing and must be published, and/or laid before the legislature for scrutiny and debate.⁶⁶

Professor Edwards similarly concluded that, in general, the federal legislation in Australia which established a Director of Public Prosecutions who is subject to written and published directives from the Attorney General was an optimal means of “conferring upon any office holder the maximum degree of independence when making prosecutorial decisions,” but also maintaining “parallel regard for sustaining the principle of ministerial accountability.”⁶⁷

In my view, these international reforms should be considered best practices.

There are also several Canadian examples of written directives to clarify and publicize government policy:

Acting on the advice of Professor Edwards, the Marshall Commission recommended that the Attorney General of Nova Scotia be given the authority to issue written guidelines and specific directives to the provincial Director of Public Prosecutions (DPP). The commission further recommended that these guidelines and directives be reduced to writing and published in the Gazette. The commission concluded that this system represented “the right blend of [day-to-day prosecutorial] independence and [ministerial] accountability.”⁶⁸

The Nova Scotia Act also contemplates consultation and discussions between the Attorney General and the DPP about individual cases which do not have to be reduced to writing and published. This has raised fears in some quarters that informal political interventions in prosecutions will occur.⁶⁹ These concerns must be acknowledged; however, in my view, they underline the fact that the success of any new institutional structure will depend in no small part on the integrity of the individuals who operate within that structure. I am confident that the directive model provides a sound institutional framework for police/government relations, which will promote transparency, accountability, and ministerial responsibility.

Key elements of the Nova Scotia DPP model have recently been adopted in the new federal *Director of Public Prosecutions Act*, including the requirement that

any specific or general directives from the Attorney General to the DPP be published in the Gazette.⁷⁰

The Arar Commission recently examined the important role of ministerial directives with respect to the national security activities of the RCMP. Justice O'Connor recommended that "the Minister responsible for the RCMP should continue to issue ministerial directives to provide policy guidance to the RCMP in national security investigations, given the potential implications of such investigations":⁷¹

Appropriate use of such directives does not interfere with the independence of the RCMP as a law enforcement agency, as the purpose of the directives is solely to provide policy guidance with respect to the overall operation of the RCMP. There is no attempt to encroach on the making of law enforcement decisions in individual cases, which comes within the legitimate ambit of police independence.⁷²

The Interim Enforcement Policy issued by the Ontario Ministry of Natural Resources can also be seen as a form of ministerial directive. Subject to some enumerated exceptions, it requires approval of the assistant deputy minister before planned enforcement procedures, including search warrants, are undertaken with respect to the exercise of Aboriginal harvesting rights. It also provides for consultation with Aboriginal chiefs before decisions are made to proceed with charges. This directive provides policy guidance and procedures to govern the exercise of law enforcement discretion. It helps provide a transparent policy structure to ensure that law enforcement discretion is exercised in a manner that takes Aboriginal and treaty rights into account.

A statutory requirement that both general guidelines and specific directives be reduced to writing and made public should help ensure that the responsible minister is held accountable for any political intervention in policing. It should also assist in ensuring that government intervention flows through the responsible minister. This, in turn, should discourage central agencies or political staff from performing an end run around the traditional and statutory framework of ministerial accountability for policing.

Government-wide consultation is perfectly acceptable, and indeed often desirable. The benefit of ministerial directives, however, is that they ensure that government policy is properly filtered and conveyed through the appropriate minister. This should help ensure that directions given to the police respect the core of police independence and the expertise of the police in operational and law enforcement matters.

It is always possible that government officials will be tempted to give advice

or directions which they are unwilling to reduce to writing or make public. A potential response to this danger would be to allow the commissioner of the OPP to request that directions from the minister be reduced to writing and tabled in a manner similar to formal ministerial directives. This would give the commissioner an option short of resigning if faced with what he or she believed to be improper or unwise direction from the responsible minister. The commissioner could also use this authority to resist attempt by officials other than the responsible minister to direct the police. The commissioner's power to require that directions be reduced to writing would undoubtedly encourage second thoughts within government about the propriety, content, and process of potential directions to the police.

Finally, ministerial directives should be, in my view, more formal than the advisory policy guidance provided in the present Policing Policy Manual. They should be treated as formal statements of government policy. Depending on their subject, they should also occasionally be promulgated as regulations under the *Police Services Act*.

Readers will note that the existing *Police Services Act* already gives the minister the authority to issue directives. The problem with the current *Act*, however, is that the process for issuing, circulating, and withdrawing ministerial directives is not transparent, systematic, or mandatory. By way of contrast, the practices adopted by the Nova Scotia and Australian jurisdictions outlined above meet these objectives. Accordingly, I recommend an equivalent process for Ontario. This process should be set out in a regulation to the *Police Services Act*.

These legislative and ministerial directive reforms will provide significant protection for the OPP from the risks of inappropriate government influence.

12.7.4 Institutional Structures and Processes within the OPP

In its Part 2 submission, the OPP recommended several additional measures the OPP could take to better insulate operational decision-makers, incident commanders, and front-line officers from inappropriate government direction or advice.⁷³

First, the OPP reported that it is developing a policy on access to the command post which would generally prohibit access to the command post by persons other than police officers.

Second, the OPP recommended that OPP officers (particularly Level 2 and Public Order Commanders) be trained in the OPP policy on access to the command post.

Third, the OPP recommended that it might be appropriate, in major incidents, for the OPP to assign an operational liaison officer designated as the contact

person for elected officials. The OPP further recommended, however, that there be no inflexible rule that commanders cannot directly communicate with politicians or other community leaders. The OPP submitted that an incident commander may have a relationship with community leaders which could be utilized to reduce the likelihood of violence.

These measures seem reasonable to me, and I recommend that the OPP pursue them actively. I also encourage the OPP to monitor the effectiveness of these measures and to adapt their policies based on this experience.

In order to promote further transparency, I also recommend that the OPP post its relevant policies, as well as any ministerial directives, on its website, circulate them to the OPP advisory committees I recommended earlier, and make them available to the public upon request.

12.7.5 Briefings, Policies, and Training

Experience at Ipperwash and elsewhere shows that MCSCS and the OPP should adopt complementary formal policies which set out their respective roles, responsibilities, and mutual expectations in police/government relations. This would provide policy-makers with a level of detail and explanation not available in legislation or regulations. These policies should adopt the principles and findings on police/government relations outlined in this report, including specific provisions on the following issues:

- The core of “police independence”
- The “policy of operations”
- Police operational responsibilities
- Government policy responsibilities
- Information exchanges between police and government
- Dedicated procedures to be used to manage police/government relations during a critical incident

All senior officials within MCSCS and the OPP should be briefed or trained in these policies as a matter of course. Other government officials should be briefed as necessary, depending on the circumstances. These policies should also be posted on the MCSCS and OPP websites and be made publicly available upon request. This would provide a level of transparency, accountability, and understanding of police/government relations above and beyond what was available at Ipperwash.

12.7.6 Police/Government Relations during a Crisis

Although a number of difficult issues with respect to police-governmental relations can be headed off by planning and mutual understandings between police and government, some issues will only emerge in the context of a critical incident. As the recent events at Caledonia demonstrate, there may also be intense media interest and ministers may find themselves subject to intense questioning, both in the Legislature and by the media. This may place enormous pressure on the police and the government to respond quickly and decisively.

As in other areas of police/government relations, I believe that decision-making during a critical incident should be guided by the need for transparency, accountability, and respect for ministerial responsibility. Wherever possible, exchanges of information and other interactions between the police and the government should be recorded, and joint minutes should be distributed and verified. Except in emergency circumstances, there should not be any direct communications from government to incident commanders and other officers on the ground. Requests for information and directions should be filtered through proper chains of command. If circumstances make these normal processes impossible, there should be an obligation to record in some form any direct dealings between government and the police. Special attention should be paid to explaining and justifying any departures from normal procedures.

There was some discussion in the Part 1 hearings about the use of “buffers” with respect to information exchange. I agree that the incident commander should generally be buffered and protected from direct knowledge of discussions within government which might affect or evaluate operational performance. As I have indicated in my Part 1 report, all communications to and from the incident commander at Ipperwash should have occurred through proper channels. At the same time, however, caution is required if buffers are extended beyond sheltering those responsible for operations. Indeed, there is a danger that the buffer concept, when applied to ministers, could run counter to the principles of ministerial responsibility and accountability which I have stressed in this report. In no way should the minister be buffered or sheltered from his or her policy responsibilities. That said, I also recognize that there are limits on a minister’s time, and many exchanges of information occur during meetings of the minister’s staff and government officials. In these circumstances, political staff and senior civil servants should take care to ensure that the minister is kept informed of events and has a full opportunity to discharge his or her policy responsibilities.

Although an interministerial and indeed an intergovernmental response will often be appropriate and necessary to respond to Aboriginal protests and occupations, policing issues should be channelled through the Ministry of Community

Safety and Correctional Services, as contemplated by the *Police Service Act* and by the traditions of constitutional democracy. Such channelling efforts should not be seen as matters of form or legal nicety. Rather, they are necessary to ensure transparency and accountability. The model of governmental policing in which the OPP is directed by all parts of government is, in my view, unworkable and it seriously undermines accountability. I would also add that channelling policing matters within the appropriate department would also ensure that the responsible policy-makers have the full benefit of the experience, expertise, and knowledge of the police. It should also ensure that the relevant representatives of both the government and the police are familiar with the history and principles of police/government relations.

12.7.7 Does the OPP Need a Police Services Board?

I am a strong supporter of the principle of civilian oversight of police services and of police service boards in a municipal context. There is no doubt that police services must be accountable to democratically elected governments or to representative bodies.

Several parties recommended that a province-wide police service board be created for the OPP as a means for addressing a number of issues that came to light during the Inquiry. Proponents of a province-wide police service board submitted that, among other benefits, a board would put greater distance between the provincial government and the OPP. For example, ALST submitted that a board “would act as a buffer between the government and the police, providing an extra layer of security against any perceived intentional or inadvertent government interference with specific day to day police operations.”

I believe that this proposal is based on an acceptance of the conventional dichotomy between policy and operations. It may also be based on a conclusion that government involvement necessarily amounts to inappropriate interference or an encroachment on police independence and therefore needs to be curtailed. In my view, taking this course would have the result of widening the scope of police independence by drawing a brighter, or wider, line between police operations and government intervention.

There is no reason to believe that a provincially elected government has a monopoly on political motivation. Municipally elected councillors or unelected appointed officials, who generally constitute the members of a local police service board, may also be politically motivated. The important principle in both contexts is that the police need to be accountable to a democratically elected civilian oversight agency.

I believe that the democratically elected provincial Cabinet minister respon-

sible for the provincial police could provide appropriate civilian oversight just as well as municipally elected councillors do, and perhaps even better than unelected, appointed officials do.

Our provincially elected officials have an obligation to be engaged with and aware of the activities of all public institutions, including our provincial police force. They have not always been so engaged in the past, and that is why, in this chapter, I recommend a closer relationship between the government and the OPP rather than a more distant one. However, it is critically important that this closer relationship be coupled with the mechanisms I described earlier in this chapter to ensure transparency and accountability for decisions made within the context of that relationship. I have concluded that the conventional dichotomy between policy and operations is insufficient to meet the objectives of contemporary police/government relations, and I believe that the new framework for police/government relations I have recommended in this report will significantly strengthen the democratic accountability and transparency of government activities in relation to the OPP.

Accordingly, notwithstanding some of the compelling arguments for establishing a province-wide police service board, I am concerned that, with its explicit objective of reinforcing the distinction between government policy and police operations, it could effectively reinforce what is already a problematic distinction.

A province-wide police service board, no matter how well organized or constituted, would add another layer of authority and potentially further diffuse ministerial accountability for the police service rather than improve it. It could lessen if not obstruct the potential benefits of the new framework I have recommended for police/government relations by further removing the provincial government, through the minister responsible for policing, from his or her oversight obligations. A province-wide police service board could also give the minister and provincial government a convenient, expansive, and permanent rationale for disavowing responsibility or accountability for the OPP.

Professor Roach discussed some of the merits of a province-wide police service board in his Inquiry background paper and concluded that

it could be argued that adding another body ... might only cause confusion and diffuse accountability.”⁷⁴

In this report, I have taken the approach that immediate steps need to be taken to achieve greater clarity in responsibility and accountability. The minister responsible for policing and the provincial government should assume more responsibility for the OPP’s activities rather than less, and this includes activities related to Aboriginal occupations, police/Aboriginal relations, and treaty and Aboriginal rights.

The Canadian Civil Liberties Association put it well:

Whether or not there is illegality in any protest activity, a strong element of free speech will invariably be involved, and often, of course, Aboriginal and treaty rights as well. The importance of these rights in the panoply of Canadian constitutional protections requires that government bear the total and obvious responsibility for any decisions to curtail what may occur.⁷⁵

Judged against this standard, I noted the testimony of Mr. Runciman, the Solicitor General at the time of Ipperwash. Perhaps stemming from a more traditional view that there is a clear boundary between government and police decision-making, he went to some lengths to distance himself from the activities of the OPP during the Aboriginal occupation of Ipperwash Provincial Park. Mr. Runciman characterized his role in 1995 as essentially a watching brief.

In my view, this perspective is no longer helpful. I believe that a “hands off” approach by the minister responsible for policing in the province is inappropriate during or following an Aboriginal occupation or protest.

Other reasons for and against the establishment of a police service board were shared with me over the course of the Inquiry. The OPP recommended against establishing an OPP police service board. Its position was based, in large part, on several practical challenges to establishing a workable board owing to the complexity of the OPP’s policing arrangements across the province:

[The OPP provides] direct policing services to approximately 182 municipalities not policed by another service, and to another 130 municipalities via 103 contracts. It provides direct policing to 19 First Nations and administers policing for 20 more First Nations. It delivers specialized police services pursuant to 135 specialized service framework agreements and on request from the Crown Attorney, a police services board, a Chief of Police or the Ontario Civilian Commission on Police Services. The OPP provides policing on highways, waterways, provincial parks and trail systems. It provides investigative assistance to municipal and First Nation police services, and is responsible for emergency response and resources for major incidents, emergencies or disasters.⁷⁶

Other experienced observers, notably former Deputy Attorney General Larry Taman and former Deputy Solicitor General Elaine Todres, did not believe that a province-wide police service board to govern the OPP was necessary or advisable—for both practical and financial reasons.

There are many difficult philosophical, organizational, and structural issues to be resolved before one could confidently recommend the establishment of a province-wide police services board. In its submission, the OPP articulated many of them, including the following: What would the relationship be between the province-wide police service board and local police service boards that already exist in many of the municipalities where the OPP provides police services? Depending on which of the 400 communities it polices was involved, would the OPP be answerable to two police service boards? What would the relationship be between the province-wide police service board and First Nations communities?⁷⁷

There was no consensus on these issues during the hearings or in the submissions by the parties.

I am in favour of any mechanism that has the potential to improve public participation in OPP decision-making, as were several senior OPP officials who testified at the hearings, including former OPP Commissioners Thomas O’Grady and Gwen Boniface. However, unlike municipal police service boards, a provincial board is more likely to be far removed from the local communities served by the OPP. It would be hard to replicate the dynamic, democratic participation of community groups that contributes so significantly to municipal policing policy and accountability. In the absence of that participation, a provincial police service board might offer the appearance but not the reality of democratic legitimacy.

In making its arguments for a province-wide police services board, ALST described the role of the Northern Ireland Police Services Board and its relationship to District Policing Partnerships (DPPs). My understanding is that, among other things, the DPPs are a means through which local community interests are channeled into local police planning, thus providing a forum for consultation on matters affecting the policing of the district.

In my view, Ontario could adapt this Irish practice to our own context and could benefit from it. For example, the provincial government could establish regional citizen advisory committees, reporting directly to the minister and advising the minister regarding his or her policy and oversight responsibilities. These committees could reflect the local communities they serve and include Aboriginal participation. In this way, they could provide many of the benefits of a province-wide police service board but still keep the responsible minister engaged and involved.

In conclusion, notwithstanding my strong support for the role played by local police service boards, my preference is for a revitalized model of democratic policing based on the recommendations set out in this report.

I want to emphasize that my analysis on this subject is premised on my expectation that the reforms I have recommended in this chapter will be implemented

fully by the OPP and the provincial government. It is also based on the premise that the OPP and the provincial government will adopt my recommendations, set out elsewhere in this report, regarding policing as it relates to Aboriginal peoples. In the absence of these changes, a province-wide police service board may well be the only means of achieving the desired objectives of transparency, accountability, and participation in police decision-making by Aboriginal peoples and other citizens.

Therefore, I recommend that this issue be reviewed two years from the date of this report, and if the recommendations I have made have not been implemented or have not had the desired effect, I urge the provincial government to reconsider the issue of the need for a province-wide police service board.

12.8 Role of the Deputy Minister of Community Safety and Correctional Services

At present, the commissioner of the OPP reports to the deputy minister of Community Safety and Correctional Services. This structure is intended, in part, to “buffer” or shield the minister from allegations of inappropriate political interference in police decision-making.

From a democratic policing perspective, the deputy minister’s “buffer” role is problematic. One of the main points I have made in chapter is that the provincial government and the OPP must carefully consider the manner in which they communicate with each other and then they must be prepared to be accountable for that communication in a manner as open and transparent as possible.

The insertion of the deputy minister between the minister and the commissioner encourages the minister to take a “hands-off” approach to policing matters. It also reduces accountability, because the deputy minister is clearly not publicly accountable for his or her decisions in the same manner as the minister is. Therefore, a direct reporting relationship between the minister and the commissioner of the OPP makes good sense and follows naturally from the transparency/accountability analysis set out in this chapter. It would also acknowledge that the relationship between the provincial government and OPP is governed by unique rules and considerations that are not applicable to other ministry operating divisions.

Changing the OPP commissioner’s reporting relationship in this manner would match the reporting relationship between the commissioner of the RCMP and the federal policing minister.

12.9 Other Law Enforcement Agencies

The police were obviously the focus of attention in Ipperwash, but I am well aware that many of the Aboriginal people who participated in Part 2 expressed serious concerns about possible confrontations between Aboriginal people and others in government, most notably MNR conservation officers. As a result, I believe that my Part 2 mandate to make recommendations to prevent violence means that I cannot ignore the possibility of confrontations between Aboriginal people and others in government who exercise police powers. The protest at Burnt Church is perhaps the most notable example of a confrontation involving a non-police enforcement agency, in that case the federal Department of Fisheries and Oceans.

The enforcement powers of conservation officers and their relationship to police independence raises unique issues: Do MNR conservation officers have the same independence as police officers, or do different considerations apply? What policies or practices, if any, should be implemented with respect to conservation officers in this area?

Unlike police/government relations or police independence, the issue of conservation officer or quasi-police independence does not appear to have been analyzed by any previous inquiry or report. Nevertheless, I have been assisted in this area by a number of helpful submissions or Part 2 projects, including from the Chippewas of the Nawash Unceded First Nation, the Union of Ontario Indians, the OPP, and the Ministry of Natural Resources. The background paper on regulatory regimes, commissioned by the Inquiry from Jean Teillet, was also very helpful.

My MNR-related analysis in the preceding chapters emphasized the need for consistency and coordination of police/MNR policies and processes. I also emphasized that the same general principles that apply to the police or provincial government generally should also apply to MNR.

It could be argued that conservation officers should have the same independence and discretion as police officers do, because they are involved in law enforcement. No doubt, many considerations justifying police independence apply equally to conservation officers. For example, there is no reason to believe that conservation officers exercising their enforcement powers should be any more subject to partisan influence than police officers are. As a result, it is certainly possible that a court could find that those who exercise powers as peace officers enjoy a limited degree of independence from government direction when they exercise their law enforcement discretion in individual cases.

It could also be argued that the role of the police is distinct from that of other public servants and that it would be dangerous to recognize that civil servants have the same independence as the police do in our democracy.

Both arguments have merit. Nevertheless, I continue to believe that it would be a mistake to reduce this issue to a simple question of whether conservation officers enjoy police independence. On the contrary, I believe that the principle of shared or overlapping operational and policy responsibilities which I have applied to the police should be applied to conservation officers as well. In practice, this would mean that conservation officers could have a limited “core” of independence in their law enforcement functions. It would also mean, however, that the government has both the authority and the responsibility to intervene in policy issues, to issue policy directives, and to identify policies of operations as may be appropriate.

The provincial government has developed an Interim Enforcement Policy to govern the application of the *Fish and Wildlife Conservation Act* to Aboriginal harvesting for personal or community use. As noted above, the Interim Enforcement Policy is an example of how the provincial government can establish a “policy of operations” in an accountable and transparent manner.

In the circumstances, I believe that it would be appropriate for the Ministry of Natural Resources and any other law enforcement agency to adopt and distribute a ministerial policy with respect to ministerial directives to enforcement officers which are consistent with the principles and findings in this report regarding police/government relations generally. I do not believe that this policy needs to be promulgated in legislation or regulations.

Recommendations

71. Section 17 of the *Police Services Act* should be amended to specify that the power of the responsible minister to direct the OPP does not include directions regarding specific law enforcement decisions in individual cases, notwithstanding the responsible minister’s authority to issue directives under s. 3(j) of the *Act*. This section should be further amended to specify that the commissioner of the OPP has “operational responsibility with respect to the control of the OPP, subject to written directives from the responsible minister.”
72. The *Police Services Act* should be amended to prohibit anyone but the responsible minister (or his or her delegate) from providing directions to the OPP. The *Act* should also specify that ministerial directions must be directed to the commissioner of the OPP (or his or her delegate).
73. A regulation should be issued under the *Police Services Act* specifying the procedure for issuing, circulating, and withdrawing ministerial directives.

This regulation should specify that

- a. all ministerial directives are to be in writing, subject to the limited exception of an extraordinary or exigent circumstance which prevents the directive from being written down. In these situations, the directive must be issued in writing at the earliest opportunity; and
- b. all ministerial directives should be publicly accessible, including being published in the *Ontario Gazette*, posted on the Ministry of Community Safety and Correctional Services website, and available to the public upon request within seven days of being issued. This provision is subject to the limited exception that the publication/circulation of the directive should be delayed if it would affect public safety or the integrity of an ongoing police operation. In these situations, the directive should be published/circulated at the earliest opportunity.

74. The regulation should also specify that

- a. the commissioner of the OPP should refuse to consider a government direction which is not in writing or not intended to be made public;
- b. the responsible minister does not have the authority to offer “guidance” as opposed to “direction” to the commissioner of the OPP; and
- c. government intervention with respect to “policies of operations” must be in the form of a written ministerial directive.

75. The OPP should post relevant ministerial directives on its website, circulate them to the OPP advisory committees, and make them available to the public upon request.

76. The Ministry of Community Safety and Correctional Services and the OPP should adopt complementary formal policies that set out their respective roles, responsibilities, and mutual expectations in police/government relations. These policies should adopt the principles and findings on police/government relations outlined in this report, including specific provisions on the following issues:

- The core of “police independence”
- The “policy of operations”
- Police operational responsibilities



All photos: Peter Rehak

On October 13 and 14, 2004, the Inquiry organized a two-day Indigenous Knowledge Forum in Forest. Commissioner Sidney Linden watches Residents of Aazhoodena drummers during the preparations. At left is Clifford George, next to his daughter, Lorraine George.



Forum participants watch Kettle and Stony Point First Nation drummers at the start of the proceedings.



Lorraine George, administrator at the Kettle and Stony Point First Nation Reserve and Chief Tom Bressette.



Wally McKay, from the Sachigo Lake First Nation and a member of the Inquiry's Research Advisory Committee, facilitated the Forum.



Attendees included OPP Commissioner Gwen Boniface, center, seen talking to Superintendent Ron George. At left are William Horton, counsel for the Chiefs of Ontario, and Andrea Tuck-Jackson, counsel for the Ontario Provincial Police.



Participants in the Youth and Elders Forum About Aboriginal and Police Relations, held in Forest on April 22, 2005. Its purpose was to hear the perceptions of Aboriginal youth about the police.



Commissioner Sidney Linden speaking at the start of the event.



Jodie-Lynn Waddilove, Assistant Commission Counsel, leads a discussion during the Youth and Elders Forum.



Commissioner Sidney Linden listens to youth participants during a breakout session.



Aboriginal officers from the Ontario Provincial Police drum at a function at the Kettle and Stony Point Reserve.



Nye Thomas, the Commission's Director of Policy and Research, moderating the OPP forum, "Aboriginal Initiatives – Building Respectful Relationships."



Kathleen Lickers, counsel for the Chiefs of Ontario, asking a question during the OPP Forum.



Professor Peter Russell of the Inquiry's Research Advisory Committee.



Bob Goulais, Chief of Staff & Executive Assistant to the Grand Council Chief, Union of Ontario Indians.



Nathan Wright, justice researcher, Chiefs of Ontario.



Peter Rosenthal, Counsel for Residents of Aazhoodena.



On March 8 and 9, 2006, the Chiefs of Ontario presented a forum on aboriginal issues to the Commission. Photo shows drummers and one of the discussion panels. From left: Kathleen Lickers, Counsel, Chiefs of Ontario; Eliza Montour, articling student, Chiefs of Ontario; Nathan Wright, justice researcher, Chiefs of Ontario; Ontario Regional Chief Angus Toulouse and Dan Gaspe, moderator.



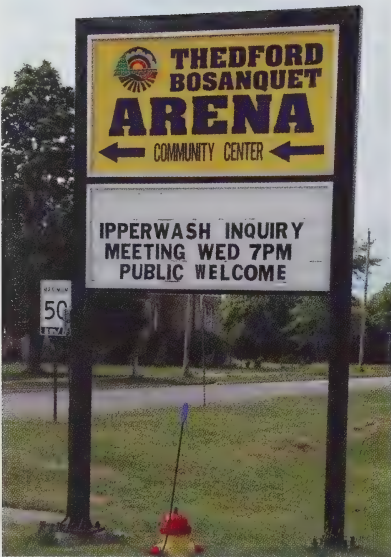
From left: Deputy Grand Council Chief Nelson Toulouse, Union of Ontario Indians; Chief David General, Six Nations of the Grand River; Darrell Doxtator, Political Advisor to Chief David General, Six Nations of the Grand River.



Commissioner Sidney Linden and moderator Fred Kelly.



From left: Jonathan Rudin, a member of the Inquiry's Research Advisory Committee, Kim Murray, Aboriginal Legal Services of Toronto Executive Director, and ALST counsel Julian Falconer. Behind Mr. Falconer are Retired RCMP Commissioner Philip Murray, of the Inquiry's Research Advisory Committee, and Inquiry investigator Anil Anand.



On June 21, 2006, the Inquiry held a community consultation in the Thedford Arena.

- Government policy responsibilities
- Information exchanges between police and government
- Dedicated procedures that will be used to manage police/government relations during a critical incident

All senior officials within the Ministry of Community Safety and Correctional Services and the OPP should be briefed or trained on these policies. Other government officials should be briefed as necessary. These policies should also be posted on the Ministry of Community Safety and Correctional Services and OPP websites and be made publicly available upon request.

77. The OPP should establish policies and procedures to insulate operational decision-makers, incident commanders, and front-line officers from inappropriate government direction or advice.
78. The Ministry of Natural Resources should develop a policy respecting ministerial directives to its conservation officers which is consistent with the principles and findings on police/government relations generally as set out in this report.

Endnotes

- 1 Margaret E. Beare and Tonita Murray, eds, *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007).
- 2 The McDonald Commission examining the activities of the RCMP, the APEC Inquiry, the Nova Scotia inquiry that examined Donald Marshall's wrongful conviction, and the Arar Commission all discussed police/government relations.
- 3 Philip Stenning, "The Idea of the Political 'Independence' of the Police: International Interpretations and Experiences" (Inquiry research paper).
- 4 See chapter 9 for my discussion of the police operational perspective on Aboriginal occupations and protests.
- 5 Please note my discussion of the three types of Aboriginal occupations and protests in chapter 2.
- 6 Stenning, p. 8. Professor Stenning pointed out that "there is no less concern to avoid undesirable partisan or special interest influence over police decision-making in the United States or Scotland or continental European countries than in countries like England, Canada, Australia and New Zealand Rather, what the governance arrangements in these countries demonstrate is that the common law doctrine of "police independence" is not the only mechanism through which such concerns may be addressed and such undesirable influences averted."
- 7 See generally Kent Roach, "The Overview: Four Models of Police/Government Relations" (Inquiry research paper), pp. 46-60.
- 8 *R. v. Metropolitan Police ex parte Blackburn* [1968] Q.B. 126 at 135-136.
- 9 Geoffrey Marshall, *Police and Government* (London: Methuen, 1965), p. 34.
- 10 J.L.I.J Edwards, *Ministerial Responsibility for National Security* (Ottawa: Supply and Services Canada, 1980), p. 94-5. For example, Prime Minister Pierre Trudeau (as quoted) responded to allegations of RCMP wrong-doing in the early 1970s in part by arguing that it was

[t]he policy of this Government, and I believe the previous governments in this country, has been that they ... should be kept in ignorance of the day-to-day operations of the police force and even of the security force. I repeat that is not a view that is held by all democracies but it is our view that and it is one we stand by. Therefore, in this particular case it is not simply a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular Minister of the day should not have a right to know what the police are doing constantly in their investigative practices, what they are looking at, and what they are looking for, and the way in which they are doing it The police don't tell their political superiors about routine criminal investigations.
- 11 *Royal Canadian Mounted Police Act* R.S.C. 1985 c.R-10.
- 12 *R. v. Campbell and Shirose* [1999] 1 S.C.R. 565 at para. 27.
- 13 *Ibid.*, at para. 29.
- 14 *Ibid.*, at para. 18.
- 15 *Ibid.*, at para. 33.
- 16 It is unlikely that *Campbell and Shirose* or the Supreme Court would even guarantee police independence in all criminal investigations. For example, a growing number of criminal offences, including those involving hate propaganda and terrorism, require the Attorney General's consent before the commencement of a prosecution. Some extraordinary police powers, such as the use of investigative hearings or preventive arrests in relation to terrorism investigations, also require the Attorney General's consent.
- 17 Other provincial policing acts follow this model of recognizing the power of the responsible minister, usually the Solicitor General, to direct the police. See *Police Act* R.S.B.C. 1996 c.367 s.7, *Police Act* R.S.A., 2000 c. P-17 s.2(2) and *Police Act* S.Q. 2000 c.12 s.50.

- 18 O.C. 497/2004. As in the federal sphere, the responsible provincial minister has recently been renamed as the Minister of Community Safety and Correctional Services.
- 19 *Bisaillon v. Keable and Attorney General of Quebec* 1980 Carswell 22 at para 28 (Que.C.A.) rev'd on other grounds [1983] 2 S.C.R. 60.
- 20 OPP Part 2 submission, para. 167.
- 21 *Ibid.*, para. 169.
- 22 Canada. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report, vol. 2 (Ottawa: Supply and Services Canada, 1981), pp. 1005-6 [McDonald Commission report, vol. 2].
- 23 *Ibid.*, p. 868.
- 24 *Ibid.*, p. 1013
- 25 *Ibid.*
- 26 Roach, p. 35, quoting the Marshall Commission report (see note 68).
- 27 I discuss the public order policing findings of the APEC Inquiry in chapter 9.
- 28 Canada. Commission for Public Complaints Against the RCMP, The Honourable Ted Hughes, "Commission Interim Report" (2001), ch. 10.4, <http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?ArticleID=376>.
- 29 *Ibid.*, ch. 31.3.1.
- 30 Canada. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. The Honourable Dennis O'Connor, Commissioner, A New Review Mechanism for the RCMP's National Security Activities (Ottawa: Public Works and Government Services Canada, 2006), p. 458 [Arar Commission report].
- 31 *Ibid.*, p. 460.
- 32 *Ibid.*, p. 463.
- 33 Larry Taman testimony, November 14, 2005, Transcript p. 227. My only qualification to Mr. Taman's comments is that police accountability is achieved through the responsible minister, not the government at large.
- 34 Donald J. Savoie, *Breaking the Bargain* (Toronto: University of Toronto Press, 2003), p. 268. Professor Savoie commented that the multiplicity of departments and agencies involved in major files may well have reached the point where "accountability—in the sense of retrospectively blaming individuals or even departments for problems—is no longer possible or fair."
- 35 Independent Commission on Policing for Northern Ireland, Rt. Hon. C. Patten, Chair, *A New Beginning: Policing in Northern Ireland* (London: 1999), p. 7 [Patten report].
- 36 *Ibid.*, p. 25.
- 37 *Ibid.*, p. 22.
- 38 *Ibid.*, pp. 24-5.
- 39 *Ibid.*, p. 36.
- 40 Arar Commission report, p. 463.
- 41 Larry Taman testimony, November 14, 2005, Transcript p. 45.
- 42 Elaine Todres testimony, December 1, 2005, Transcript p. 74.

- 43 Dianne L. Martin, “Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context” (Inquiry research paper).
- 44 Patten report, p. 32.
- 45 McDonald Commission report, vol. 2, pp. 868-9.
- 46 Ibid., pp. 1007-8.
- 47 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “The RCMP and National Security: A Background Paper to the Commission’s Consultation Paper” (December 2004), pp. 41-3 <<http://www.ararcommission.ca/eng/RCMP%20and%20National%20Security.pdf>>.
- 48 Arar Commission report, p. 329.
- 49 OPP Part 2 submission, para. 157.
- 50 As quoted (with emphasis added) in J.L.I.J Edwards Ministerial Responsibility for National Security (Ottawa: Supply and Services Canada, 1980), pp. 94-5.
- 51 Arar Commission report, p. 463.
- 52 Patten report, p. 33.
- 53 OPP Part 2 submission, para. 161.
- 54 Ibid., para. 163.
- 55 McDonald Commission report, vol. 2, p. 1013 (emphasis in original).
- 56 Ministry of Community Safety and Correctional Services, Roles and Relationships between the Minister, the Deputy Minister and the Ontario Provincial Police: A Summary, undated slide presentation (on file with the Inquiry).
- 57 Roach, p. 65.
- 58 OPP Part 2 submission, para. 176.
- 59 Patten report, p. 32.
- 60 I prefer “ministerial policy responsibility” to “government policy responsibility” because it isolates the role of the responsible minister.
- 61 Edwards, Ministerial Responsibility, p. 97.
- 62 See generally Roach, pp. 46-62.
- 63 Canadian Civil Liberties Association submission, p. 4.
- 64 Stenning, p. 80.
- 65 René Marin, Policing in Canada (Aurora: Canada Law Book, 1997), p. 121. Section 6 of South Australia’s Police Act, 1998 No 55 of 1988 provides that the Commissioner is responsible for the control and management of the police “subject to this Act and any written directions of the Minister.” Section 7 provides that there shall be no ministerial directions in relation to internal matters of pay, discipline, hiring, and firing. Section 8 provides that a copy of any ministerial direction to the commissioner shall be published in the Gazette within eight days of the direction and laid before Parliament within six sitting days.
- 66 Stenning, pp. 59-60.
- 67 J.L.I.J. Edwards: Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 5: Walking the Tightrope of Justice - An Examination of the Office of Attorney General: A Series of Opinion Papers (Halifax: Queen’s Printer, 1989).

- 68 Nova Scotia. Royal Commission on the Donald Marshall, Jr. Prosecution, Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Halifax: Queen's Printer, 1989), pp. 229-230.
- 69 Section 6 (c) of the Public Prosecutions Act provides for consultations that do not bind the Director of Public Prosecutions (DPP) and s. 6a, added in 1999, provides that the Attorney General and the DPP shall "discuss policy matters, including existing and contemplated major prosecutions" at monthly meetings. See Edwards, *Walking the Tightrope of Justice*, p. 189. I note that there are no informal consultation provisions in the new federal Director of Public Prosecutions Act.
- 70 Director of Public Prosecutions Act s. 10-12 in Bill C-2 as passed by House of Commons.
- 71 Arar Commission report, p. 329.
- 72 *Ibid.*, p. 330
- 73 See generally OPP Part 2 submission, paras. 191-8.
- 74 Roach, pp. 38-9.
- 75 Canadian Civil Liberties Association submission, p. 6.
- 76 OPP Part 2 submission, para. 183.
- 77 OPP Part 2 submission, p. 88.

RECOMMENDATIONS PART 2 OF THE INQUIRY

Chapter 4 – Settling Land Claims

1. The provincial government should establish a permanent, independent, and impartial agency to facilitate and oversee the settling of land and treaty claims in Ontario. The agency should be called the Treaty Commission of Ontario.
2. The Treaty Commission of Ontario should be established in a provincial statute as an independent agency reporting directly to the Legislative Assembly of Ontario. The Treaty Commission of Ontario should have permanent administrative, legal, and research staff and should be fully independent from the governments of Canada, Ontario, and First Nations. The statute should specify that the purpose of the Treaty Commission of Ontario is to assist Ontario in discharging its treaty responsibilities.
3. The provincial government should make every reasonable effort to establish the Treaty Commission of Ontario with the full cooperation of the federal government. If that is not possible, the provincial government should establish the Treaty Commission of Ontario on its own in cooperation with First Nations in Ontario.
4. The governments of Ontario, Canada, and First Nations should jointly select the head of the Treaty Commission of Ontario—the Treaty Commissioner of Ontario. The selection process should be set out in the statute following discussions among the parties. The Treaty Commissioner should serve for a fixed but renewable term and should be removed only upon agreement by First Nations and the Legislative Assembly of Ontario.
5. The Treaty Commission of Ontario should be inaugurated in a prominent and ceremonial way. The ceremony should recall the 1764 Treaty of Niagara and renew its promises of mutual support and respect.
6. The Treaty Commission of Ontario should be given a four-part, strategic mandate:

- a. The TCO should be given the authority to assist governments and First Nations, independently and impartially, in developing and applying a wide range of tools and processes to clarify and settle issues in an expeditious and cooperative way. In furtherance of this mandate, the TCO should be given the authority to prioritize, consolidate, or batch claims, in whole or in part, to encourage joint fact-finding and historical research, to identify and find consensual ways of dealing with issues common to claims associated with a particular treaty or region, and to promote interest-based settlements.
 - b. The TCO should be given the mandate to improve the efficiency and cost-effectiveness of the land claims process in Ontario. The TCO should be given the authority to work with parties to establish and publish benchmarks for processing claims and to require parties to use various forms of dispute resolution, binding as well as non-binding, when the benchmarks are not met.
 - c. The TCO should be given the mandate to make the claims process accountable and transparent to all Ontarians.
 - d. The TCO should be given a broad mandate to undertake public education about treaties, treaty relationships, and land claims in Ontario. The TCO should be given the specific authority to develop programs about treaty history designed to be part of the Ontario school curriculum.
7. The provincial and federal governments should commit sufficient resources to the TCO to enable it to achieve its objectives.
 8. Access to the Ontario land claims process should depend entirely on whether the documentation filed by the First Nation provides *prime facie* evidence that there has been a breach of the legal obligations of the Crown.
 9. The provincial government should improve public education about its land claim policies.
 10. The provincial government should commit sufficient funds to enable the Ontario land claims process to resolve claims within an acceptable period. This includes funding for First Nations to participate in the land claims process and for compensation for breaches of legal obligations by the Crown.
 11. The provincial government and the TCO should work together to develop a business and financial plan for the Ontario land claims process. The

objective would be to estimate the resources needed to resolve claims and to meet reasonable benchmarks during the land claims process.

12. The federal government should cooperate fully with the provincial government and First Nations in Ontario to establish the Treaty Commission of Ontario and promote its effectiveness.
13. The federal and provincial governments should work with the TCO and any equivalent federal agency to improve the efficiency, effectiveness, and fairness of the federal and provincial land claims processes. Together, they should undertake to do the following:
 - a. Establish a common registry for federal and Ontario land claims.
 - b. Establish a dispute resolution process that includes access to non-binding and binding resolution.
 - c. Use binding arbitration to determine the legal liabilities of the federal and provincial governments.
 - d. Develop common or consistent benchmarks and policies for federal and Ontario land claims.

The provincial government should make every reasonable effort to seek the federal government's cooperation on these issues. If that cooperation is not possible, the provincial government should proceed to address these issues on its own in cooperation with First Nations in Ontario.

Chapter 5 – Natural Resources

14. The provincial government should work with First Nations and Métis organizations to develop policies regarding how the government can meet its duty to consult and accommodate. The duty to consult and accommodate should eventually be incorporated into provincial legislation, regulations, and other relevant government policies as appropriate.
15. The provincial government should promote respect and understanding of the duty to consult and accommodate within relevant provincial agencies and Ontario municipalities.
16. The provincial government should continue to work with Aboriginal organizations in Ontario to develop co-management arrangements and

resource-sharing initiatives. The provincial government should also provide financial or other support to Aboriginal organizations and third parties to develop capacity, identify best practices, and formulate strategies to promote co-management and resource-sharing.

17. The provincial government should commission an independent evaluation of one or more significant co-management initiatives. This evaluation should be undertaken with the cooperation and participation of Aboriginal organizations.
18. The Ministry of Natural Resources and First Nations should work together to update and improve the Interim Enforcement Policy. This process should include discussions on how to evaluate and monitor the implementation of the policy and on how to improve the transparency and accountability of MNR enforcement activities.
19. The Ministry of Natural Resources and other provincial ministries whose activities in the regulation of natural resources affect Aboriginal and treaty rights should develop and circulate a Statement of Aboriginal Values which addresses their relations with Aboriginal peoples.
20. The Ministry of Natural Resources should establish a public complaints process.
21. The provincial government should develop and circulate a policy outlining how it will notify and consult with interested third parties on natural resource initiatives involving Aboriginal peoples.

Chapter 6 – Aboriginal Burial and Heritage Sites

22. The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate.
23. The provincial government should ensure that the *Funeral, Burial and Cremation Services Act, 2002* includes the same appeal process for all

types of cemeteries and burials and an obligation to consider Aboriginal values if a burial site is determined to be Aboriginal.

24. The provincial government, in consultation with First Nations and Aboriginal organizations, should clarify the meaning of “Aboriginal values” in all Class EA documents and other guidelines and policies applicable to public lands.
25. The provincial government, in consultation with First Nations and Aboriginal organizations, should determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites.
26. The provincial government should encourage municipalities to develop and use archaeological master plans across the province.
27. The provincial government should prepare plain language public education materials regarding Aboriginal burial and heritage sites.
28. The provincial government should work with First Nations and Aboriginal organizations to develop an Aboriginal burial and heritage site advisory committee.

Chapter 7 – Education About Aboriginal Peoples

29. The provincial government and Treaty Commission of Ontario should work with First Nations organizations and educators to develop a comprehensive plan to promote general public education about treaties in Ontario. The provincial government and Treaty Commission of Ontario should also work with local governments and school boards, First Nations, and community organizations to develop educational materials and strategies that emphasize the local or regional character of treaty relationships.
30. The Ministry of Education should establish formal working relationships with Aboriginal organizations to promote more Aboriginal perspectives and content in the elementary and secondary school curricula.
31. The Ministry of Education and Treaty Commission of Ontario should work with Aboriginal organizations, school boards, and teachers associations to develop appropriate, classroom-ready teaching tools and resources about Aboriginal history, treaty and Aboriginal rights, and related current events.

Chapter 8 – Provincial Leadership and Capacity

32. The provincial government should create a Ministry of Aboriginal Affairs. This ministry should have a dedicated minister and its own deputy minister.
33. The provincial government should create the appropriate Cabinet structure to support the new ministry. The provincial government should consider establishing a new Cabinet committee on Aboriginal Affairs and should consider including the Minister of Aboriginal Affairs on the Priorities and Planning Board of Cabinet.
34. The initial mandate and responsibilities of the Ministry of Aboriginal Affairs should include the following:
 - a. Administer and support a revitalized land claims process in Ontario.
 - b. Create and support a Treaty Commission of Ontario.
 - c. Ensure that the province fulfills its duty to consult and accommodate.
 - d. Improve Aboriginal/non-Aboriginal community relationships.
 - e. Establish the Ontario Aboriginal Reconciliation Fund.
 - f. Oversee and report on the implementation of the recommendations of the Ipperwash Inquiry.
35. The provincial government should commit sufficient resources to the Ministry of Aboriginal Affairs to enable it to carry out its responsibilities. The budget for the ministry should include funding for a revitalized land claims process in Ontario, for the Ontario Aboriginal Reconciliation Fund, and for programs to improve Aboriginal/non-Aboriginal relations in Ontario.
36. The provincial government and Ministry of Aboriginal Affairs should create mechanisms for obtaining input from Aboriginal communities on planning, policy, legislation, and programs affecting Aboriginal interests.
37. The provincial government should establish and fund an Ontario Aboriginal Reconciliation Fund. The Ministry of Aboriginal Affairs should work with First Nations and Aboriginal organizations to determine the mandate, governance structure, funding guidelines, and administrative structure of the fund. The provincial government should commit sufficient resources to the fund to enable it to achieve its objectives.

Chapter 9 – Policing Aboriginal Occupations

38. Police services in Ontario should promote peacekeeping by adopting the following objectives when policing Aboriginal occupations and protests:
 - a. Minimize the risk of violence at occupations and protests.
 - b. Preserve and restore public order.
 - c. Facilitate the exercise of constitutionally protected rights.
 - d. Remain neutral as to the underlying grievance.
 - e. Facilitate the building of trusting relationships that will assist the parties to resolve the dispute constructively.
39. The OPP should maintain its Framework for Police Preparedness for Aboriginal Critical Incidents, Aboriginal Relations Teams, and related initiatives as a high priority and devote a commensurate level of resources and executive support to them.
40. The OPP should commission independent, third-party evaluations of its Framework for Police Preparedness for Aboriginal Critical Incidents and Aboriginal Relations Team program. These evaluations should include significant and meaningful participation by Aboriginal representatives in their design, oversight, and analysis.
41. The OPP should post all significant OPP and provincial government documents and policies regarding the policing of Aboriginal occupations and protests on the OPP website. The OPP should also prepare and distribute an annual report on the Framework for Police Preparedness for Aboriginal Critical Incidents.
42. The OPP should establish a formal consultation committee with major Aboriginal organizations in Ontario.
43. The OPP should develop a consultation and liaison policy regarding non-Aboriginal communities which may be affected by an Aboriginal occupation or protest. This policy should be developed in consultation with local non-Aboriginal communities and should be distributed to local officials and posted on the OPP website.
44. The OPP should develop a strategy to restore relationships with both

Aboriginal and non-Aboriginal communities after an Aboriginal occupation or protest. The provincial, federal, and municipal governments should support and participate in this strategy. This strategy should be distributed to interested parties and posted on the OPP website.

45. The provincial government should develop a provincial peacekeeping policy to govern its response to Aboriginal occupations and protests. The policy should publicly confirm the provincial government is committed to peacekeeping, and it should promote consistency and coordination between the provincial government and police services in Ontario. This policy should include:
 - a. a ministerial directive from the Minister of Community Safety and Correctional Services to the OPP confirming peacekeeping as the provincial government policy during an Aboriginal occupation or protest. The directive should acknowledge and support the general purposes and practices of the OPP Framework for Police Preparedness for Aboriginal Critical Incidents; and,
 - b. a ministerial guideline from the Minister of Community Safety and Correctional Services to other police services in Ontario, functionally equivalent to the OPP directive but allowing for adaptation to local circumstances.

The provincial peacekeeping policy should state that it is applicable to the Ministry of Community Safety and Correctional Services, the OPP, the Ministry of Natural Resources, and any other ministries or agencies which may be involved in an Aboriginal occupation or protest.

The provincial peacekeeping policy should be promulgated as soon as practical. The Ministry of Community Safety and Correctional Services should then initiate a consultation process with First Nations, the OPP, other police services, and local communities as appropriate regarding the scope and content of a longer-term policy.

46. The provincial government should commit sufficient resources to the OPP to support its initiatives for policing Aboriginal occupations. This funding should be dependent upon the OPP agreeing to commission and publish independent evaluations of the Framework for Police Preparedness for Aboriginal Critical Incidents and the Aboriginal Relations Team program.
47. The provincial government should develop a policy governing the use of

injunctions at Aboriginal occupations and protests. The policy should state that its purpose is to promote peacekeeping in Aboriginal occupations and protests. The policy should acknowledge the unique role of the Attorney General in injunction proceedings and commit the province to participating in proceedings where private landowners seek an injunction and treaty and Aboriginal rights may be affected.

48. The OPP should have the right to be represented separately in injunction proceedings. The provincial government should facilitate court-appointed counsel for interested parties in injunction proceedings if their participation would contribute to the court's understanding of the issues in dispute.
49. Interministerial "blockade" committees should be organized carefully to ensure that they respect ministerial accountability. These committees should be briefed on the following matters:
 - a. appropriate roles and responsibilities of police and government;
 - b. existing provincial government and police peacekeeping policies;
 - c. general aspects of police strategy and objectives when policing Aboriginal occupations and protests;
 - d. the unique constitutional status of Aboriginal rights and claims, and the constitutional right of peaceable assembly; and,
 - e. the history, issues, and claims that may be in dispute.

Relevant ministers, ministerial staff, and other senior provincial officials should also be briefed on these issues.

50. The provincial government should adopt a flexible policy regarding negotiations with protesters during an Aboriginal occupation or protest. The factors to be considered should include:
 - a. a realistic assessment of the claim asserted by the protesters;
 - b. risks to public safety;
 - c. the willingness or capacity of protesters or the First Nation to negotiate;
 - d. the likelihood of a constructive, peaceful, timely agreement;
 - e. the social or economic disruption caused by the occupation; and,
 - f. any other relevant factors.

51. Federal, provincial, municipal, and First Nation governments should actively promote public education and community information about significant Aboriginal protests. The OPP should also actively promote public education and community information.
52. The federal government should publicly commit to working with the provincial government during Aboriginal occupations or protests in Ontario, cooperatively and with a shared commitment to settling underlying disputes. The federal government should generally assume the lead responsibility in negotiations when land claims are at stake.
53. The provincial government, First Nations organizations, the OPP, and other police services in Ontario should develop networks promoting communication, understanding, trust, and collaboration during Aboriginal occupations and protests. The following elements should be included in this effort:
 - a. The OPP and First Nations organizations in Ontario should develop public safety, communications, and/or operational protocols.
 - b. The OPP and First Nations police services should jointly plan for responding to Aboriginal occupations and protests. Existing protocols between the OPP and First Nation police services should be amended to include references to occupations and protests.
 - c. The provincial government, the OPP, and representatives from municipal police services should develop resources, practices, or protocols to assist municipal police services during Aboriginal occupations and protests in urban areas.
 - d. The OPP and the Ministry of Natural Resources should develop an operational protocol consistent with the purposes and practices in the OPP Framework for Police Preparedness for Aboriginal Critical Incidents.
 - e. The OPP should provide crisis negotiator training to First Nations police services.
54. The OPP and other police services should provide verified information to the media in their news releases. Inaccurate information should be corrected promptly and publicly.
55. The Ministry of Community Safety and Correctional Services should bring together interested parties to discuss the Tactical Emergency Medical Support

and civilian emergency medical services issues in this report, including the advice and recommendations of the Office of the Chief Coroner.

Chapter 10 – First Nation Policing

56. The federal and provincial governments should update their policies on First Nation policing to recognize that self-administered First Nation police services in Ontario are the primary police service providers in their communities.
57. The provincial government, OPP, and First Nation police services should work together to identify how the provincial government can support First Nation police services to be as effective as possible when policing Aboriginal occupations and protests, either within their own territories or in support of the OPP or other police services in Ontario. The OPP and First Nation police services should engage in joint planning and training for Aboriginal occupations and protests and existing protocols should refer to occupations and protests.
58. Federal, provincial, and First Nation governments should commit to developing long-range plans for First Nation policing in Ontario.
59. Federal, provincial, and First Nation governments should commit to developing a secure legislative basis for First Nation police services in Ontario.
60. The provincial government should work with the Nishnawbe Aski Nation, the Nishnawbe-Aski Police Services, and other First Nations in Ontario as appropriate to develop a “made in Ontario” legislative or regulatory framework for First Nation policing in Ontario. The provincial government should also amend the *Police Services Act* to allow First Nation police services or boards to appoint their own officers.
61. The provincial government, First Nation police services, and the OPP should establish an Ontario First Nation Chiefs of Police Association.
62. The federal and provincial governments should increase capital and operational funding for First Nation police services in Ontario. This funding should be secured by renewable, five-year agreements between the federal, provincial, and First Nation governments.

Chapter 11 – Bias-Free Policing

63. The OPP should maintain its Native Awareness Training and related police/Aboriginal relations initiatives as a high priority and devote a commensurate level of resources and executive support to them.
64. The OPP should develop active, ongoing monitoring strategies for its police/Aboriginal relations strategy and programs, including:
 - a. commissioning an independent, third-party evaluation of its Native Awareness Training and recruitment initiatives;
 - b. commissioning data collection studies to evaluate police decision-making and operations. These studies should be designed in partnership with First Nation organizations and the Ontario Provincial Police Association, if possible; and
 - c. working with First Nations organizations to develop a more formal monitoring and implementation program for the OPP police/Aboriginal programs.
65. The provincial government should develop a provincial police/Aboriginal relations strategy. This strategy should publicly confirm the commitment by the province to improving Police/Aboriginal relations in Ontario. Elements of this strategy should include the following:
 - a. The Ministry of Community Safety and Correctional Services should work with the OPP and Aboriginal organizations to develop a provincial policy supporting the OPP police/Aboriginal relations programs.
 - b. The Ministry of Community Safety and Correctional Services should work with the OPP, Aboriginal organizations, other police services, and the Ontario Human Rights Commission to identify and circulate best practices in police/Aboriginal relations.
 - c. The Ministry of Community Safety and Correctional Services should develop a provincial research and data collection strategy to promote improved police/Aboriginal relations policy and programs and bias-free policing across Ontario.
 - d. The Ministry of Community Safety and Correctional Services should issue a guideline for police forces in Ontario promoting best practices in police/Aboriginal relations.

- e. The Ministry of Natural Resources should develop and implement a dedicated MNR/Aboriginal relations strategy, consistent with the analysis and recommendations in this report.
- 66. The provincial government should commit sufficient resources to the OPP to support its police/Aboriginal relations initiatives. This funding should be dependent upon agreement by the OPP to commission and publish independent evaluations of its Native Awareness Training and recruitment initiatives.
- 67. Bill 103, the *Independent Police Review Act, 2006*, should be reviewed to ensure that internally generated complaints related to a police service are handled by the Independent Police Review Director, including complaints relating to racism and other culturally insensitive behaviour.
- 68. The Independent Police Review Director should determine the most appropriate policy to be followed by his or her office and police services in Ontario in handling complaints of misconduct involving racism and other culturally insensitive conduct, including the role, if any, for informal discipline. The Independent Police Review Director should consult with community and Aboriginal organizations when developing this policy.
- 69. The Ministry of Community Safety and Correctional Services should issue a directive to all police services in Ontario, including the OPP, requiring police officers to report incidents of racism or other culturally insensitive behaviour by other officers to their supervisors.
- 70. The OPP should establish an internal process to ensure that racist and other culturally insensitive behaviour by police officers is dealt with publicly. The OPP should also determine the most appropriate policy for handling complaints of misconduct involving racism and other culturally insensitive conduct, including the role, if any, for informal discipline.

Chapter 12 – Police/Government Relations

- 71. Section 17 of the *Police Services Act* should be amended to specify that the power of the responsible minister to direct the OPP does not include directions regarding specific law enforcement decisions in individual cases, notwithstanding the responsible minister's authority to issue directives under s. 3(j) of the *Act*. This section should be further amended to specify that the commissioner of the OPP has "operational responsibility with respect to

the control of the OPP, subject to written directives from the responsible minister.”

72. The *Police Services Act* should be amended to prohibit anyone but the responsible minister (or his or her delegate) from providing directions to the OPP. The *Act* should also specify that ministerial directions must be directed to the commissioner of the OPP (or his or her delegate).
73. A regulation should be issued under the *Police Services Act* specifying the procedure for issuing, circulating, and withdrawing ministerial directives. This regulation should specify that
 - a. all ministerial directives are to be in writing, subject to the limited exception of an extraordinary or exigent circumstance which prevents the directive from being written down. In these situations, the directive must be issued in writing at the earliest opportunity; and
 - b. all ministerial directives should be publicly accessible, including being published in the *Ontario Gazette*, posted on the Ministry of Community Safety and Correctional Services website, and available to the public upon request within seven days of being issued. This provision is subject to the limited exception that the publication/circulation of the directive should be delayed if it would affect public safety or the integrity of an ongoing police operation. In these situations, the directive should be published/circulated at the earliest opportunity.
74. The regulation should also specify that
 - a. the commissioner of the OPP should refuse to consider a government direction which is not in writing or not intended to be made public;
 - b. the responsible minister does not have the authority to offer “guidance” as opposed to “direction” to the commissioner of the OPP; and
 - c. government intervention with respect to “policies of operations” must be in the form of a written ministerial directive.
75. The OPP should post relevant ministerial directives on its website, circulate them to the OPP advisory committees, and make them available to the public upon request.
76. The Ministry of Community Safety and Correctional Services and the OPP

should adopt complementary formal policies that set out their respective roles, responsibilities, and mutual expectations in police/government relations. These policies should adopt the principles and findings on police/government relations outlined in this report, including specific provisions on the following issues:

- The core of “police independence”
- The “policy of operations”
- Police operational responsibilities
- Government policy responsibilities
- Information exchanges between police and government
- Dedicated procedures that will be used to manage police/government relations during a critical incident

77. All senior officials within the Ministry of Community Safety and Correctional Services and the OPP should be briefed or trained on these policies. Other government officials should be briefed as necessary. These policies should also be posted on the Ministry of Community Safety and Correctional Services and OPP websites and be made publicly available upon request.
78. The OPP should establish policies and procedures to insulate operational decision-makers, incident commanders, and front-line officers from inappropriate government direction or advice.
79. The Ministry of Natural Resources should develop a policy respecting ministerial directives to its conservation officers which is consistent with the principles and findings on police/government relations generally as set out in this report.

APPENDIX B

RESEARCH PAPERS COMMISSIONED BY THE INQUIRY

1. Taiaiake Alfred and Lana Lowe, “Warrior Societies in Contemporary Indigenous Communities”
2. Margaret Beare, “The History and the Future of the Politics of Policing”
3. John Borrows, “Crown and Aboriginal Occupations of Land: A History & Comparison”
4. Gordon Christie, “Police-Government Relations in the Context of State-Aboriginal Relations”
5. Don Clairmont, “Aboriginal Policing in Canada: An Overview of Developments in First Nations”
6. Don Clairmont and Jim Potts, “For the Nonce: Policing and Aboriginal Occupations and Protests”
7. Michael Coyle, “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future”
8. Willem de Lint, “Public Order Policing in Canada: An Analysis of Operations in Recent High Stakes Events”
9. Michael Feldman, Brian Schwartz, and Laurie Morrison, “Effectiveness of Tactical Emergency Medical Support: A Systematic Review”
10. Darlene Johnston, “Respecting and Protecting the Sacred”
11. Human Sector Resources, “Challenge, Choice & Change: A Report on Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples”
12. John Hylton, “Canadian Innovations in the Provision of Policing Services to Aboriginal Peoples”
13. Dianne Martin, “Legal Sites of Executive-Police Relations: Core Principles in a Canadian Context”

14. Wesley Pue, "Trespass and Expressive Rights"
15. Kent Roach, "The Overview: Four Models of Police-Government Relationships"
16. Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System"
17. Lorne Sossin, "The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance"
18. Noelle Spotton, "A Profile of Aboriginal Peoples in Ontario"
19. Philip Stenning, "The Idea of the Political 'Independence' of the Police: International Interpretations and Experiences"
20. Jean Teillet, "The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario"
21. Wayne Wawryk, "The Collection and Use of Intelligence in Policing Public Order Events"

APPENDIX C

 INQUIRY EVENTS IN PART 2

The Ipperwash Inquiry organized or sponsored the following in Part 2:

1. Ipperwash Inquiry/Osgoode Hall Law School Symposium on Police/Government Relations. (Toronto, Ontario: June 28/29, 2004)
2. Indigenous Knowledge Forum. (Forest, Ontario: October 13/14, 2004)
3. Mennonite Central Committee of Ontario Consultation with the Ipperwash Inquiry. (Zurich, Ontario: January 14, 2005)
4. Community meeting to discuss Aboriginal burial and sacred sites. (Aazhoodena (Camp Ipperwash), Ontario: February 26, 2005)
5. Consultation on natural resource issues, with Jean Teillet, author of “The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario.” (Toronto, Ontario: March 15, 2005)
6. Emergency Medical Procedures roundtable in partnership with the Office the Chief Coroner for Ontario. (Toronto, Ontario: April 15, 2005)
7. Youth and Elder Forum about Aboriginal/Police Relations. (Forest, Ontario: April 22, 2005)
8. Consultation on land claims issues, with Michael Coyle, author of “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future.” (Toronto, Ontario: April 29, 2005)
9. Consultation on policing of Aboriginal occupations and protests, with John Borrows, author of “Crown and Aboriginal Occupations of Land: A History & Comparison” and Don Clairmont and Jim Potts, authors of “For the Nonce: Policing and Aboriginal Occupations and Protests.” (Toronto, Ontario: August 19, 2005)
10. Chippewas of Nawash Unceded First Nation Community Forum with the Ipperwash Inquiry. (Neyaahiinigamiing (Cape Croker), Ontario: September 8/9, 2005)

11. Consultation about Aboriginal burial and other sacred sites, with Darlene Johnston, author of “Respecting and Protecting the Sacred.” (Toronto, Ontario: December 8, 2005)
12. “Aboriginal Initiatives: Building Respectful Relationships,” presentation to the Ipperwash Inquiry by the Ontario Provincial Police. (Forest, Ontario: January 26/27, 2006)
13. “Special Assembly with the Ipperwash Inquiry,” presentation to the Ipperwash Inquiry by the Chiefs of Ontario. (Forest, Ontario: March 8/9, 2006) (See Appendix D, 4. Chiefs of Ontario, for a list of projects related to this event.)
14. “Incident Command Presentation,” presentation to the Ipperwash Inquiry by the Ontario Provincial Police. (Orillia, Ontario: May 31, 2006)
15. “An Evening with the Commissioner,” a town hall public meeting with residents of Forest/Lambton Shores. (Thedford, Ontario: June 21, 2006)

The Inquiry also organized a number of expert meetings in Toronto chaired by Inquiry staff. These meetings provided a forum for discussion among Inquiry staff and counsel, Research Advisory Committee members, background paper authors, parties with standing in Part 2, and invited experts. The purpose of these meetings was to ensure a complete and forthright discussion of the issues and to canvass the diversity of opinion among the people attending.

APPENDIX D

PROJECTS OF THE PARTIES WITH STANDING IN PART 2 OF THE INQUIRY

1. Aazhoodena and George Family Group, “Aazhoodena: The History of Stoney Point First Nation”
2. Aboriginal Legal Services of Toronto (John Miller), “Ipperwash and the Media: A critical analysis of how the story was covered”
3. African Canadian Legal Clinic (Scot Wortley), “Police Use of Force in Ontario: An Examination of Data from the Special Investigations Unit”
4. Chiefs of Ontario (for the Special Assembly with the Ipperwash Inquiry of March 8/9, 2006)
 - a. Final Submission to the Ipperwash Inquiry, Part II
 - b. Ontario Regional Chief Angus Toulouse, Remarks
 - c. Union of Ontario Indians, background paper for the “Examining the Relationship” panel
 - d. The Association of Iroquois and Allied Indians, background paper for the “Examining the Relationship” panel
 - e. Nishnawbe Aski Nation, background paper for the “Examining the Relationship” panel
 - f. Grand Council Treaty #3, background paper for the “Reconciling the Relationship” panel
 - g. Mohawks of Akwesasne, background paper for the “Justice: Peace and Conflict” panel
 - h. Nishnawbe Aski Nation, background paper for the “Bilateral and Intergovernmental Relations” panel
 - i. Bkejwanong Territory (Walpole Island), background paper for the “Bilateral and Intergovernmental Relations” panel

- j. Grand Council Treaty #3, background paper for the “Justice Initiatives” panel
 - k. Chiefs of Ontario, background paper for the “Ontario Provincial Police Framework for Police Preparedness for Aboriginal Critical Incidents” panel
5. Chippewas of Nawash Unceded First Nation
 - a. “Under Siege: How the People of the Chippewas of Nawash Unceded First Nation Asserted Their Rights and Claims and Dealt with the Backlash”
 - b. David McLaren, “Encountering the Other: Racism against Aboriginal People”
 6. Mennonite Central Committee of Ontario, Report of Mennonite Central Committee of Ontario (MCCO) to Ipperwash Inquiry Commission following a consultation at Zurich Mennonite Church on January 14, 2005”
 7. Nishnawbe-Aski Police Services Board (Wally McKay), “Confrontations over Resources Development”
 8. Ontario Provincial Police (background papers)
 - a. OPP Part II Materials: Introduction
 - b. Aboriginal Initiatives: Building Respectful Relationships
 - c. OPP Responses to Commission Questions: Aboriginal Initiatives
 - d. Jim Potts Award
 - e. OPP Emergency Response Services: A Comparison of 1995 to 2006
 - f. OPP Public Order Units: A Comparison of 1995 to 2006
 - g. Summary of Changes to POU, 1995-2006
 - h. OPP Intelligence Services: A Comparison of 1995 to 2006
 - i. OPP Daily Journals and Note Taking: A Comparison of 1995-2006 (Police Orders)
 - j. The Impact of Stress on Officers and the OPP Response: Introductory Overview

- k. OPP Guide to Legislation and Policy
 - l. Aboriginal Officers: Outreach and Inreach
 - m. List of Aboriginal Initiatives: Building Respectful Relations
 - n. Chart - Chronology of Screening and Training for Aboriginal Issues
 - o. OPP Level Two/Critical Incidents-Recording and Retention of Recordings
 - p. Refinements to the Framework for Police Preparedness for Aboriginal Critical Incidents
 - q. Screening and Training for Aboriginal Issues
 - r. Summary of Changes to Integrated Response 1995 - 2006
9. Province of Ontario (background papers)
- a. The Regulatory Role of the Ontario Ministry of Natural Resources and the Ministry's Relations with Aboriginal People
 - b. Interim Enforcement Policy
 - c. Questions regarding the Ministry of Natural Resources
 - d. The Resolution of Land Claims in Ontario
10. Union of Ontario Indians
- a. Dwayne Nashkawa, "Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario"
 - b. Dwayne Nashkawa, "Anishinabek First Nations Relations with Police and Enforcement Agencies"
 - c. Fred Bellefeuille, "Anishinabek Perspectives on Roundtable Forums that Support Issue Resolution"
 - d. Community Consultations Report

